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# CARE, NOT DETENTION -UNDERSTANDING THE SITUATION OF UNACCOMPANIED MINORS IN EUROPE - CHALLENGES AND POSSIBILITIES

Dissertação com vista à obtenção do grau de
Mestre em Direito Europeu e Internacional

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Abstract:

Menores não acompanhados requerentes de asilos que deixam o seu país de origem são confrontados com múltiplos desafios e situações de perigo quando estão a caminho do seu país de destino. No entanto, mesmo quando chegam a países tidos como sendo seguros e respeitadores de direitos humanos, estes menores sofrem ainda várias violações a este nível, perpetuadas pelos estados receptores. Esta tese tem em consideração este tópico em solo da União Europeia, focando-se no mais importante instrumento legal internacional de direitos humanos para a protecção de crianças, a Convenção sobre os Direitos da Criança, e a principal directiva para a recepção de requerentes de asilo, bem como tendo em conta outros documentos vinculativos e não vinculativos, doutrina e jurisprudência relevantes. Consagrado na Convenção está uma parte controversa e essencial desta, o princípio do melhor interesse da criança, sobre o qual esta dissertação irá reflectir ao analisar a detenção de um grupo vulnerável, os menores não acompanhados requerentes de asilo, em território pertencente à União Europeia. De forma a conseguir isto, a tese analisa as diferentes fases que levam e influenciam a detenção de menores - os processos à chegada, o procedimento de asilo e as garantias legais processuais. Por fim, elabora-se uma reflecção sobre o acto de detenção de menores não acompanhados requerentes de asilo através da analise dos princípios de "último recurso" e "pela mínima duração possível". Assim sendo, a tese ambiciona clarificar a famosa, mas desconhecida, situação dos menores não acompanhados requerentes de asilo que chegam à Europa e as violações de direitos humanos de que são vítimas, olhando para como a ilegalidade dos actos perpetuados é provada através de documentos e princípios legais internacionais, regionais e nacionais, mesmo se estes são defendidos e perpetuados por certos Estados.

Summary:

Unaccompanied asylum seeking minors leaving their countries of origins face a serious of challenges and dangerous situations on the way to their countries of destination. However, even when they arrive at safe countries they still face a number of violations of human rights, perpetuated by the receiving states. This thesis approaches this matter in the European Union, focusing on the main international human rights instrument protecting children, the Convention on the Rights of the Child, and the central European directive on the reception of asylum seekers, alongside other relevant binding and non-binding legal documents, doctrine and jurisprudence. Enshrined in the Convention is the best interest of the child principle, a controversial and essential part of it, which this dissertation will reflect upon through the detention of unaccompanied asylum seeking minors, a vulnerable group, in European Union territory. In order to do this, the thesis analyses the different stages that lead and affect the detention of minors - arrival procedures, asylum granting processes and judicial guarantees. Finally, it seeks to reflect on the act of the detention of unaccompanied asylum seeking minors itself by its assessing its legality concerning the principle of last resort and the principle of minimum time of detention as possible. As such, this thesis aims to shine light on the numerous violations of human rights that unaccompanied asylum seeking minors often suffer upon arrival in Europe and how their illegality is proven through a series of international, regional and national legally binding articles and principles, even if these acts are continuously perpetuated and states attempt to justify them.

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## INTRODUCTION

"The most vulnerable of the vulnerable"[1], "symbols of the dramatic impact of humanitarian crisis on individual lives"[2] and "in urgent need of protection"[3] are some of the words that have been used to describe the situation of unaccompanied asylum seeking minors. These are minors who escape international and non-international conflicts and/or are fleeing persecution and are often looking over other unaccompanied minors while travelling without any parent or guardian of age through a perilous journey across borders and seas in the hopes of achieving a safe country of destination that will provide them with the needed support as defined in the Convention for Refugees of 1951[4]. However, it has become shockingly clear that destination countries are not prepared to provide refugees, in particular unaccompanied minors, with the much need support system they need and are owned by international law. Indeed, the refugee flows from the Middle East, particularly Afghanistan, Iran and Syria, into Europe have laid bare the flaws of a system which is not equipped to deal with asylum seekers and, as the Merkel-Erdogan deal has shown[5], will not be improved upon with the goal of being open to the reception of those in need of international protection. If the photo of a perished young boy on a Greek beach, Alan Kurdi, served to wake up the popular opinion to the fact that

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[1] A. Guterres, *Opening Remarks by António Guterres, United Nations High Commissioner for Refugees; Launch of UNHCR's Report 'Children on the Run'*, 12 March 2014, UNHCR, available at http://www.unhcr.org/admin/hcspeeches/5321c5c39/opening-remarks-antonio-guterres-united-nations-high-commissioner-refugees.html (last visited 14 September 2017].

[2] International Committee of the Red Cross, Central Tracing Agency and Protection Division, *Inter-Agency Guiding Principles on Unaccompanied and Seperated Children* (2004), available at https://www.unicef.org/protection/IAG_UASCs.pdf (last visited 14 September 2017], at 2.

[3] United Nations International Children's Emergency Fund (UNICEF), *Unaccompanied Refugee and Migrant Children in Urgent Need of Protection, Warns UNICEF*, 6 May 2016, UNICEF, available at https://www.unicef.org/media/media_91069.html (last visited 14 September 2017].

[4] United Nations General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, Vol. 189, p. 137 137.

[5] M. Karnitschnig and J. Barigazzi, *EU and Turkey Reach Refugee Deal – European Leaders and Ankara Agree on Relocation of Syrian Asylum-Seekers.*, 20 March 2016, POLITICO, available at http://www.politico.eu/article/eu-and-turkey-finalize-refugee-deal/ (last visited 14 September 2017].

refugees are more than faceless numbers[6], the truth is that the rise in populist right-wing conservative discourse across the world, namely in traditionally democratic European countries like France or the Netherlands, [7] have showed that the old continent is growing increasingly intolerant of foreigners in any manner. In regards to unaccompanied minors in particular, reports from non-governmental agencies and decisions of the European Court for Human Rights have shown that the rights of unaccompanied minors, in their capacity as humans, children and refugees, are routinely violated in various ways, with the lack of oversight in the asylum granting process and irregular detention being frequently matters appealed in courts and the most frequent being related to article 3 and the prohibition of torture, inhuman or degrading treatment or punishment.[8]

Unaccompanied minors are defined by the United Nations as "An unaccompanied child is a person who is under the age of eighteen, unless, under the law applicable to the child, majority is, attained earlier and who is "separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so".[9] While this thesis will be focusing on the situation of unaccompanied refugee minors coming to Europe, it is essential to highlight that unaccompanied minors in general can be refugees, migrants, victims of human trafficking or smuggling and that, if the legal instruments draw clear cut lines between them, the truth is that the reality of their experiences and the vulnerabilities of their condition makes it so that the distinction between them is, in reality, oftentimes not so easy to define.[10] This issue is clear in several European Court for Human Rights and national high courts decisions that reveal how frequently international protection is wrongly refused to

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[6] A. Barnard and K. Shoumali, *Image of Drowned Syrian, Aylan Kurdi, 3, Brings Migrant Crisis Into Focus*, 3 September 2015, The New York Times, available at https://www.nytimes.com/2015/09/04/world/europe/syria-boy-drowning.html (last visited 14 September 2017].

[7] G. Aisch, A. Pearce and B. Rousseau, *How Far Is Europe Swinging to the Right?*, 20 March 2017, The New York Times, available at https://www.nytimes.com/interactive/2016/05/22/world/europe/europe-right-wing-austria-hungary.html (last visited 14 September 2017].

[8] N. Mole and C. Meredith, *Asylum and the European Convention on Human Rights* (Rev. ed., 2010).

[9] United Nations Commissioner for Refugees (UNHCR), *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (1997), at 1.

[10] J. Kanics et al. (eds.), *Migrating Alone: Unaccompanied and Separated Children's Migration to Europe* (2010).

unaccompanied minors[11]. For a reflection on the rights of unaccompanied refugee minors we must analyse the situations in which they are detained as this encompasses a multitude of violations of rights of unaccompanied refugee minors and exposes the vulnerability of their position in the best manner. To analyse these situations of detention of unaccompanied asylum seeking minors we must refer to the Convention on the Rights of the Child, in particular article 3 on the best interest of the child, article 22 on refugee children and articles 37 and 40 relating to detention.[12] The principle of the best interest of the child will be one of the legal lens through which we will reflect upon the situation of unaccompanied minors in detention. Understanding that the best interest of the child is a value which varies in content from child to child, the dissertation will argue that, beyond the common principles for the best interest of the child of all ages, the application of this principle must take into consideration the age of the minor in question. In addition, the best interest of the child must also always imply a consideration of the minor's cultural and religious condition[13]. Finally, the best interest of the child will also serve to support the thesis of this dissertation and its ultimate conclusion, that detention is never in the best interests of the child since it inherently violates numerous rights. Moreover, I will also argue that detention, when used, is not as a last resort nor for the shortest time possible, as is required by international and European instruments. Due to the influx of unaccompanied minors into Europe since the beginning of the century, with an increase in the past couple of years, its jurisprudence and number of binding legal documents, the continent becomes an appropriate choice for this thesis which wishes to withdraw conclusions of the application of the best interest of the child and the practice of the detention of refugee seeking unaccompanied minors.

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[11] These are some cases that receive due process and effective remedy, but this thesis will be focus on the times this does not happen in order to reveal the systematic failure to protect unaccompanied minors in Europe

[12] United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations Treaty Series, Vol. 1577, p. 3.

[13] European Court of Human Rights (ECtHR), *Darboe and Camara v Italy*, Appl. no. 5797/17, Judgment of 18 January 2017, all ECtHR decisions are available online at http://hudoc.echr.coe.int/.

The investigation and basis for this thesis is mostly based on literature and jurisprudence, complemented by interviews with members of NGOs, as well as discussions at the United Nations in Geneva on the topic. The approach chosen to consider the situation of unaccompanied refugee minors in detention in Europe is primarily focused on legal jurisprudence and doctrine but does not deny the importance of including theories of other disciplines to elaborate and reach more comprehensive conclusions. Indeed, in order to properly understand the several foundations and ramifications of the current refugee situation in Europe and draw up a comprehensive analysis one has to reach out to different academic genres As such, we will refer to anthropological theories, namely those that address refugees as political subjects, and psychology to reflect on the different needs of children and the special considerations in terms of care that must be provided for unaccompanied minors in order to fulfil the principle of the best interest of the child.

The first section of this work will focus on the evolution of the child as a subject of rights and how, historically, the core legal instrument of the rights of the child, the Convention on the Rights of the Child, has evolved and how it actually serves to show the different approaches that surround the founding and the development of the rights of the child. In particular, as the following section analyses, this thesis will pay attention to article 3, the best interests of the child, which is a principle, I will argue, which shapes a lot of the discussion and legal action surrounding the rights of the child. However, the dissertation will recognise the difficulties that arise in dealing with such a broad term which is not easily definable nor applicable. Nevertheless, it is this exact broadness that can also bring some advantages into the application and interpretation of the best interest of the child.

Following this, the work will evolve by exploring the different meanings of "refugee" and "unaccompanied minor" and their legal status in international and European law. This will take into consideration both binding and non-binding legal instruments, as we are attempting to grasp in the best way possible how the rights of the asylum seeking child are conceived and applied as a whole. As such, we will look at the

special legal provisions created for refugee children in the Convention on Refugees and the Convention on the Rights of the Child and we will compare them with the protection afforded to this vulnerable group in European legislation, amongst other.

Thereafter, the dissertation will focus on the process that unaccompanied minors face upon arrival into Europe, the asylum granting process and the cases in which detention is practiced while continuously taking into consideration the principle of the best interest of the child and the existing jurisprudence and doctrine on the different matters. As such, it will first focus on the conditions and legality of entry into the country of unaccompanied asylum seeking minors, including its dangers, followed by the procedural guarantees and processes for being granted asylum, or international protection in case the first is not granted, as well as analysing different jurisprudence that gives insight of just how essential procedural guarantees are for the protection of present and future rights of asylum seekers but specially for those in a most vulnerable position, like unaccompanied asylum seeking minors.

After, there will be a focus on the particular conditions for detention, be it the reasons for detaining asylum seekers and the rights these enjoy as such, again, with a particular focus on the specific privileges that should be granted to juveniles and, in particular, asylum seeking minors. For this, the dissertation will turn again to doctrine and to several jurisprudence, that bare the failures of the legal instruments and institutions to adequately protect the unaccompanied asylum seeking minor.

Lastly, I will conclude this thesis by arguing that state-members resort to detention not as a last resort and that this is in direct contradiction of numerous international conventions and European legislation, particularly the Convention on the Rights of the Child. On the other hand, we will explore viable alternatives to detention that can be used instead and some options that are in the best interest of the child.

The thesis will conclude with a reflection on the principle of the best interest of the unaccompanied refugee child and try to elaborate ways in which this principle can

and should be better observed considering the existing legal provisions and perhaps even creating legal provisions at a regional and national level that will allow for the fulfilling of the obligations under the Convention on the Rights of the Child and the Convention on Refugees.

Through a comprehensive and careful analysis of the entire asylum granting process that unaccompanied refugee minors must endure upon arrival to Europe, looking at detention in order to do so, and the legal provisions attached to it, this thesis aims to demonstrate that there is a systematic failure, at international, regional and national level, to live up to international and regional obligations to provide care and assistance to those who are the most vulnerable of refugees. Indeed, the purpose of this work is to make clear that these children have been exposed to horrific events on their way to Europe and that all unaccompanied minors must be received in proper conditions, never through detention, and legal assistance must be provided in a clear manner throughout the asylum application process. Likewise, it is important to mention that integration efforts, albeit legally in place, only reach a minority of refugees,[14] are essential for a successful and healthy childhood for unaccompanied minors. Their condition as "the most vulnerable of the vulnerable" must be analysed alongside the principle of the best interest of the child and other provisions in the Convention on the Rights of the Child to assure that the assistance given is not only in accordance to legal instruments but also ensures that these children are provided with the deserved support and legal assistance and never detained.

[14] J. Sunderland, *For Europe, Integrating Refugees Is the Next Big Challenge*, 13 January 2016, Human Rights Watch, available at https://www.hrw.org/news/2016/01/13/europe-integrating-refugees-next-big-challenge (last visited 14 September 2017].

## The Child as a Subject of Rights - The Convention on the Rights of the Child

Although nowadays children are legally assured special provisions that serve to protect their rights, the truth is that the child as a subject of rights in itself has not always existed. However, during the late nineteenth century and early twentieth century, civil society organisations joined efforts to combat white-slave traffic and child labour in factories and mines. Although the movement itself did not stand for a broad range of rights for all children, the truth is that the foundation for the rights of the child had been laid down and when the drafting of the Covenant of the League of Nations a provision was included that obliged its members to "endeavour to secure and maintain fair and humane conditions of labour for men, women and children"[15] and to "entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children"[16]. Later, in 1921, thirty five countries belonging to the League formed the "Association internationale pour la protection de l'enfant", inspired by the 1923 Charter of Save the Children International Union, was the first instrument which explicitly acknowledge the rights of children was the 1924 Declaration of the Rights of the Child, even though it did not place obligations on states. However, it is important to notice that the child was here still not the subject holder of rights, but rather the object of the protection, as it was made clear by article 5 which reads "the child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men".[17] Furthermore, after the Second World War, the International Labour Organisation established a resolution concerning the Protection of Children and Young Workers (1945).[18] With the death of the League of Nations and the creation of the United

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[15] Article 23 (a) of the Convention on the Rights of the Child of 1989.

[16] Article 23 (c) of the Convention on the Rights of the Child of 1989.

[17] United Nations Office of the High Commissioner for Human Rights and Save the Children (eds.), *Legislative History of the Convention on the Rights of the Child, Volume I* (2007).

[18] International Labour Conference, International Labour Organization, *Resolution Concerning the Protection of Children and Young Workers, Submitted by the Committee on the Protection of Children and Young Workers*, 15 October 145AD, available at http://staging.ilo.org/public/libdoc/conventions/Technical_Conventions/Convention_no._77/77_English/09616(1945-27)Appendix_XIII.pdf (last visited 14 September 2017].

Nations there was a revival of the interest for the rights of the child, with a consideration of possibly updating the 1924 Geneva Declaration, which ultimately culminated in the approval of the 1959 Declaration of the Rights of the Child[19] drafted by the Economic and Social Council[20] and the Commission on Human Rights, a legal document which started to conceive children as entitled to rights.[21]

In 1976, the Economic and Social Council decided to declare the international year of the child[22] which also set out as a priority the providing of a framework for "advocacy on behalf of children".[23] In 1978, the original Polish proposal is submitted to the Director of the Division of Human Rights and, two years later, the Working Group for the creation of a convention on the rights of the child is approved by the General Assembly.[24]

The Convention on the Rights of the Child is the most universally ratified international legal document[25] but its fruition was the result of a long negotiation between United Nations member-states. Drafted during the height of the Cold War, its writing is a reflection of the two opposing sides - the western block which prioritised civil and political rights and the Soviet block which gave importance to the promotion of economic, social and cultural rights.[26] The proposal to create a legal

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[19] United Nations General Assembly, *Declaration of the Rights of the Child*, A/RES/1386(XIV), 20 November 1959, available at https://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf (last visited 14 September 2017].

[20] The approved version of the text is considerably more conservative than the one proposed by the Commission on Human Rights which addressed more polemic issues such as the rights of children born out of wedlock (principle 1).

[21] United Nations Office of the High Commissioner for Human Rights and Save the Children (eds.), *supra* note 17, at 4–5.

[22] United Nations Economic and Social Council, *International Year of the Child*, decision 178 (LXI), 21 December 1976 as adopted by: United Nations General Assembly, *International Year of the Child*, A/RES/31/169, 21 December 1976, available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/31/169&Lang=E.

[23] United Nations Office of the High Commissioner for Human Rights and Save the Children (eds.), *supra* note 17, at 29.

[24] United Nations General Assembly, *Question of a Convention on the Rights of the Child*, A/RES/35/131, 11 December 1980, available at http://www.un.org/documents/ga/res/35/a35r131e.pdf (last visited 14 September 2017]; United Nations Office of the High Commissioner for Human Rights and Save the Children (eds.), *supra* note 17, at 81.

[25] Only the United States of America and Somalia have not ratified it.

[26] Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights', 8 *International Journal of Law, Policy and the Family* (1994) 1.

instrument on the rights of the child came from Poland, part of the Soviet block, and faced attempts of sabotage of its development by the United States of America during the Reagan administration, although these efforts abated once Bush Senior came to power. In 1986, UNICEF joined the drafting process more actively and contributed to the depoliticisation of the debate. With the end of the Cold War, the Eastern block was seeking to change its image in the international arena, particularly in respect to the protection of human rights, and the approval of the Convention was able to take place more easily.

Indeed, during the second half of the twentieth century, there has been a development of international and national legal instruments that have transformed the child from being an object of their parents into the titular of rights even when these come into opposition to the interests of the parents.[27] However, if there is a current consensus in international fora that children must have access to healthcare or education, the truth is that there is no agreement amongst countries about what "education" or "healthcare" entails, particularly when it comes to age and gender differences amongst minors. Nevertheless, the dissonance between countries increases when it comes to the "best interests of the child", a term that in jurisprudence and doctrine alike finds no consensus in a concrete definition. Analysing the history and development of the core international legal document regarding the rights of children - the Convention on the Rights of the Child - helps to create a better understanding of the conflicting perspectives that have risen and still shape the debates surrounding this matter today.

However, the best interests principle is not one which is limited to the Convention on the Rights of the Child. Indeed, it is present in national legislation concerning custody and divorce[28] as well as in the Declaration on Social and Legal Principles

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[27] Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function', 18 *The International Journal of Children's Rights* (2010) 483.

[28] See for instance, Parker, 'The Best Interests of the Child - Principles and Problems', 8 *International Journal of Law, Policy and the Family* (1994) 26 referencing the Australian Adoption of Children Amendment Act (Parliament of Western Australia, *Adoption of Children Amendment Act 1976*, 25 November 1976, available at https://www.slp.wa.gov.au/legislation/statutes.nsf/law_a146202.html (last visited 14 September 2017)].

relating to the Protection and Welfare of Children[29] and the African Charter on the Rights and Welfare of the Child[30]. The principle is, in a different manner, also entailed in the provisions of the International Covenant on Civil and Political Rights, in this case through the "paramount interest of the child".[31] However, these other mentions of the principle do little to clarify its meaning nor the breadth of its application. Indeed, as an "unspecified legal concept", jurisprudence can help to provide solutions for this problematic.[32] Additionally, the guidance documents released by institutions and the doctrine produced by scholars can assist in deciphering its meaning.

In conclusion, regarding the child as a subject holder of rights is an essential element of assuring their rights are protected and observed, for it is only when they are seen as the owners of their own rights, and not as if the rights that are given or provided to them by adults and figures of authorities, can the latter begin to complete observe them. The lack of regard for the guarantees of the unaccompanied minor, who is does not inherently have an adult that looks out for their interests, even if they might later be provided with a guardian, make clear how their vulnerability is often an point of entry for perpetuating the lack of provision of adequate information that is provided in age appropriate manner in language they can understand, while taking their opinion into consideration into the process of asylum seeking and its procedures.[33] Indeed, regarding the child as a full human being, and not as an individual who has

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[29] Article 5, United Nations General Assembly, *Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*, A/RES/41/85, 6 February 1987, available at http://www.un.org/documents/ga/res/41/a41r085.htm.

[30] Article 4, Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, CAB/LEG/24.9/49 (1990), 11 July 1990, available at https://www.unicef.org/esaro/African_Charter_articles_in_full.pdf (last visited 11 August 2017].)

[31] United Nations General Assembly, *International Convenant on Civil and Political Rights (ICCPR)*, 16 December 1966, United Nations Treaty Series, Vol. 999, p. 171; the notion of the ‘paramount interest of the child’ was introduced by the interpretation of the Human Rights Committee in its General Comment No. 17 (see United Nations Human Rights Committee (HRC), *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 7 April 1989, available at http://www.refworld.org/docid/45139b464.html (last visited 9 September 2017) para. 6].

[32] Zermatten, *supra* note 27.

[33] International Committee of the Red Cross, Central Tracing Agency and Protection Division, *supra* note 2.

not yet reached its full humanity until they become of age, is essential for unaccompanied minors to be respected and to be able to defend their human rights.

## THE PRINCIPLE OF THE BEST INTEREST OF THE CHILD

This chapter will start out by focusing on one of the most discussed articles in the Convention on the Rights of the Child, the one concerning the best interest of the child, later moving to other articles which are also particularly relevant for unaccompanied asylum seeking children in detention and seeing how they have influenced and have been influenced by one another. In order to draw a more comprehensive understanding of the articles of the Convention and their application, the chapter will also take into consideration the drafting history of the document, since it reveals positions and attitudes that are maintained to this day and influence the manner in which negotiations take place. Moreover, this part of the thesis will look at rights such as legal counsel or the prohibition of torture, which are essential to unaccompanied asylum seekers under detention, that are not directly covered by the Convention on the Rights of the Child.

The history of the principle of the best interest of the child begins even before the drafting of the Convention on the Rights of the Child. Indeed, the drafting and approved versionand approval of the 1959 Declaration on the Rights of the Child read "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration."[34] Although the principle might seem simple at a first approach it is, indeed, one of the most complex concepts enshrined in the Declaration and the later Convention on the Rights of the Child.[35] The issue with "the best interest" concept is its lack of precision. Indeed, as Freeman points out, different cultures will operate with different concepts and other policies can exert influence over it indirectly under the disguise of being in the best interests of the

[34] Principle 2 of the United Nations General Assembly, *supra* note 19.

[35] The principle is contained in Article 3 of the Convention on the Rights of the Child,

child.[36] Another tension present within this article relates to what are the "current best interests" and the "future best interests", but I would argue that whatever is in the best interest of the child in their future is actually their current best interest as well. However, it is important to highlight that this thesis does not agree with those who argue that detention, for example, are in the ultimate best interest of the child since it educates the child and prepares it for its future in society. Ultimately, the best interest of the child cannot deny itself its main goal - the well-being of the minor themselves. Nevertheless, one can oneself upon exactly which values - is it happiness or security, for instance - the best interests of the child must rest, particularly when these are in conflict with one another.[37] Indeed, we might claim that only “brutal agreement” can be reached in order to obtain a balance of these conflicts,[38] recurring to a needed hierarchy of values[39].

In article 1, where it reads "in all decisions concerning children...." the original proposal to add the word "official" was not accepted, which has served to extend the breath of its protection to not just official decisions, and the term "legislative bodies" was added, creating an obligation in relation to data collection, budget allocation, monitoring, dissemination and training[40]. This is particularly interesting because it ensures the protection of the child in all decisions that are carried out by government, not only those that officially directly relate to children, but in all measures adopted. [41]

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[36] M. D. A. Freeman, *Article 3: The Best Interests of the Child* (2007).

[37] Parker, *supra* note 28, at 26–41. Parker, S. (1994) The Best Interests of the Child - Principles and Problems. International Journal of Law and the Family 8. Pp.26-41

[38] S. A. Kripke, *Wittgenstein on Rules and Private Language: An Elementary Exposition* (Repr, 2000).

[39] Robbins, 'Dumont’s Hierarchical Dynamism: Christianity and Individualism Revisited', 5 *HAU: Journal of Ethnographic Theory* (2015) 173.

[40] CRC/GC/2003/5 paragraph 45

[41] United Nations Committee on the Rights of the Child, *General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, 27 November 2003, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2FGC%2F2003%2F5&Lang=en (last visited 12 July 2017], para. 45.

On the best interest of the child, whilst in the first Polish draft proposal on article 3 of the Convention it could be read that "the best interests of the child shall be the paramount consideration"",[42] the final version agreed upon claims that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"[43]. The Federal Republic of Germany ensured that the measurements can only be considered as "undertaking on the parts of States".[44] In an Austrian case in its Asylum Court, a minor had originally applied for international protection firstly in Hungary and then, less than a month later, again in Austria.[45] The plaintiff argued against his expulsion back to Hungary, where he had first logged the asylum request, since he claimed he had not been cared for sufficiently there, the national asylum procedures were not fair and, due to a lack of appropriate language interpretation, it had been assumed that he was of age and, while placed at an adult camp, he had been raped. A neurological specialist, in testimony to the court, defended that the applicant needed to receive therapeutic treatment for his traumas and a transfer to Hungary before this would increase the likelihood of permanent trauma being created and would be a clear breach of article 3, since it would clearly not be in the best interest of the child, particularly considering the Austrian government had tried to contact the Hungarian authorities so that they would secure treatment and had obtained no concrete answer. The court concluded that the presumption that certain member states are safe alongside only a possibility, not certainty, that treatment contrary to the best interest of the child would occur is not enough to label a deportation to it unlawful. Moreover, it concluded that the existence of special exceptional circumstances here, proved by the asylum seeker, is not enough to alter the presumption that other European Union countries are of safe

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[42] United Nations Office of the High Commissioner for Human Rights and Save the Children (eds.), *supra* note 17, at 10.

[43] *Ibid.*, at 335.

[44] *Ibid.*, at 336.

[45] Austria - Asylgerichtshof, *S8 413.923-1/2010/4*, S8 413923-1/2010, 27 July 2010, available at http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/AsylGH%20S8%20413923%20v.%202010-07-27.pdf (last visited 14 September 2017].

origin.[46] On the contrary, the court, while applying European Union law, should have taken the Convention on the Fundamental Rights of the European Union article 24 (2) that states that all public agencies or private institutions must give primary consideration to the best interest of the child when carrying out measures concerning children. Indeed, the court failed to uphold the best interest of the child when it did not defend the minor's wellbeing and health as its main priority, choosing instead to focus its attention on the importance of maintaining the assumption that other European Union countries are to be considered as being of safe origin[47]. The fact that the article reads "a primary consideration" and not "the primary consideration" has limited the application of the principle. By including "all actions concerning children" the protection provided by the article goes beyond legal actions. The vagueness of the principle in itself is problematic as it fails to define what the best interests of the child might be and as such has made it severely open for different interpretation, namely at country-level.[48] New Zealand, for instance, made this exact point during the drafting process - "(...) 'the best interests of the child' will be open, through the general terms in which they are couched, to varied interpretations and will in fact be defined nationally in terms of the laws and the child-rearing practices which are adopted and acceptable in that nation"[49] whilst the United States of America defended the inclusion of "cultural development with due regard for national or regional realities".[50] Later, France and the Federal Republic of Germany suggested that the term 'best interests' was changed to 'guidance'.[51] Other delegations

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[46] *Ibid.*

[47] A list of countries determined by the European Union as being safe countries of origin and, as such, it refuses to analyse these cases as it gives them little importance since they come from a country, theoretically, safe and it will end in expatriation. However, dangerous countries like Afghanistan have been considered as safe up until very recently, which shows the failure of the value system of countries as "safe" or "unsafe" according to what was politically comfortable. European Union countries, by default, regard each other as countries of safe origin and, according to its public policy, will not accept requests for asylum from citizens of the European Union

[48] Eastmond and Ascher, 'In the Best Interest of the Child? The Politics of Vulnerability and Negotiations for Asylum in Sweden', 37 *Journal of Ethnic and Migration Studies* (2011) 1185.

[49] United Nations Office of the High Commissioner for Human Rights and Save the Children (eds.), *supra* note 17, at 336.

[50] *Ibid.*

[51] *Ibid.*, at 337.

defended that the best interests principle should not be 'the paramount consideration' but only 'a primary consideration"".[52]

The best interest of the child cannot be said to always truly subjective - for instance, torture can never be in the best interest of the child.[53] The comments made by UNICEF show the concern had within the defenders of children's rights regarding the wording of the article - "by stating that the child's best interests shall be 'a primary consideration' this provision uses what amounts to a twofold consideration. The word 'primary' implies that other considerations, although not deemed primary, may nevertheless be taken into account" referring even to article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women which reads "(...) the interest of the children is the primordial consideration in all cases".[54] Kuwait, Canada, Senegal, the Netherlands, Portugal and Australia showed support for this revised version of the text, but it was not enough to change the wording of the article. Although subjectivity in the best interest of the child can be positive, as it allows for considerations that are situation-specific and age and gender sensitive, being the link between "theory and reality",[55] the lack of specificity can bring negative consequences in the creation and application of the law, namely when it leaves to judges to decide what the individual interests of a child are. As one Australian High-Judge described "in the absence of legal rules or a hierarchy of value, the best interests approach depends upon the value system of the decision-maker. Absent any rule or guideline, that approach simply creates an unexaminable discretion in the repository of power".[56] Nevertheless, it is established it imposes an obligation on states and that it can be used as a guiding principle upon which to interpret the rest of the Convention, not being considered in isolation.

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[52] *Ibid.*, at 339.

[53] Zermatten, *supra* note 27, at 483–499.

[54] United Nations Commission on Human Rights, *Technical Review of the Text of the Draft Convention on the Rights of the Child*, E/CN.4/1989/WG.1/CRP.1, 15 October 1988, available at https://digitallibrary.un.org/record/765414?ln=en (last visited 14 September 2017], at 13, 14.

[55] United Nations Office of the High Commissioner for Human Rights and Save the Children (eds.), *supra* note 17, at 342.

[56] *Ibid.*, at 344.

The principle of the best interests of the child is a rule of procedure that is the foundation for substantive rights, bridging all decisions concerning children. What Zarmatten calls the "control criterion", the principle is applied to ensure that the child is fully able to exercise their rights and that all obligations towards children are fulfilled in all actions or decisions taken by the institutions in article 3.[57] While Parker argues that there is no difference is using the terms child and children in article 3, making her point through the example of resource allocation,[58] but I would argue that the interest of an individual child and children as a group can be in conflict, for instance, when it comes to providing a child with special provision, this could mean that other children in the same situation will not have access to the same resources. By interplaying the terms "child" and "children", the provision ensures that it covers both individual situations and decisions concerning groups of children,[59] not only at the present time but also in the future. On the other hand, the "solution criterion" allows it to also be the principle that helps decision-makers to make the most appropriate decision for children, representing "the bridge between the theory and its practical exercise on the field".[60]

Paragraph 2 of article 3 partially clarifies the principle, stating that “state parties must ensure the necessary protection and care for all children in their territory irrespective of their nationality and status”, is of special importance to unaccompanied refugee minors as it safeguards that they are to be given access to all services of care and protection that the country secures to other minors who are nationals or other aspects of their status, namely their official legality status in the country, making sure that there can be no discrimination in this regard towards foreign children or refugee children who did not officially enter the country with permission, as is the case with

[57] Zermatten, *supra* note 27.

[58] Parker, *supra* note 28.

[59] Conflict between the best interests is also present, for this, see, United Nations Committee on the Rights of the Child, *General Comment No. 7, Implementing Child Rights in Early Childhood*, CRC/C/GC/7/Rev.1, 20 September 2006, available at http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf (last visited 19 August 2017], para. 13.).

[60]Zermatten, *supra* note 27.

the vast majority of unaccompanied asylum seeking minors. Indeed, paragraph 3 elaborates on the needed conditions for institutions, services and facilities, claiming that "institutions, services and facilities for care or protection of children must conform with established standards", which implies that these governments also carry the obligation to create these mechanisms and, inter alia, inspection institutions just for children, which can attend to their particular necessities.

## THE BEST INTERESTS OF THE CHILD AND OTHER PRINCIPLES OF THE CONVENTION

### Article 12 - Respect for the Views of the Child

Beside article 3 on the best interest of the child, there are others, in particular, for unaccompanied refugee minors, that deserve consideration under article 12 which defines the respect for the views of the child. At first entitled "the child's right to express opinions" and considered alongside article 3, it was later considered apart from the latter and reformulated by the Committee on the Rights of the Child to read "respect for the views of the child", which clearly undermines the legal strength of this article. In fact, the final version of the draft limits this right to the child "capable of forming his or her own views", without defining the definition of such ability. If the first draft of the second paragraph of the article highlighted the choice of the child in matters of "marriage, choice of occupation, medical treatment, education and recreation"[61], after the changes drafted by the Working Group, the paragraph was amended to more broadly read " the child shall in particular be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".[62]

This article can be described as complementary, as article 12 must be applied in all situations article 3 is applied.[63] This is, there is no best interest of the child in the situation where the opinion of the child is not considered. Evidently, this must be done while taking into consideration the age and maturity of the minor. This article recognizes the right of a child to express their own views in a decision which concerns them, arguably forcing decision-makers to undertake all necessary measures to take into consideration the particular situation of the individual child, their own

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[61] Permanent Representation of the Polish People's Republic to the United Nations in Geneva, *Note Verbale Dated 5 October 1979 Addressed to the Division of Human Rights by the Permanent Representation of the Polish People's Republic to the United Nations in Geneva. Amended Draft for a Convention on the Rights of the Child*, E/CN.4/1348, 10 October 1979, available at http://repository.un.org/bitstream/handle/11176/140255/E_CN.4_1349-EN.pdf?sequence=1&isAllowed=y (last visited 14 September 2017].

[62] Article 12 of the Convention on the Rights of the Child

[63] Zermatten, *supra* note 27, at 486.

interest and their best interest. Additionally, experts argue that this articles obliges State Parties to the Convention on the Rights of the Child to legislate the creation of specific mechanisms to hear and interpret, taking into consideration the individual situation of the child, the minor's views.

In one case before the court of the Hague, a minor asylum seeker, who applied for asylum when she was sixteen years old, had his request initially denied by the Dutch authorities who held that, under article 8 of the Dublin regulation, Switzerland was responsible for processing it since her older sister was residing in this country.[64] Meanwhile, after being requested to take charge, the Swiss authorities accepted the request to analyse the plaintiff's asylum request. However, the minor appealed the transfer the decision claiming that, as she has no special relationship with her sister, who also did not wish to look after her, it would not be in her best interest to be transferred to Switzerland. Instead, she asked to remain in the Netherlands where she resided with another minor of the same nationality in a foster family and had a legal guardian appointed to her, while she was in Switzerland she had to reside, in worse conditions, in a reception centre for adult refugees. The Court of the Hague deliberated that Switzerland is only responsible for family reunification if such is in the best interest of the child and if the plaintiff was never truly part of the family of the older sister then they cannot be reunited and it stated that it was essential that the opinion of the child was heard. An important aspect to take away from this case is that, indeed, the best interest of the child is not a linear value that will always align itself with traditional ideas of family reunification and that, moreover, the opinion of the minor must be taken into account, particularly taking into consideration the age and maturity of the minor. Additionally, for this case, the court referred to the advise of an NGO which specialises in unaccompanied minor cases in the Netherlands, and had closely followed the case and advised that the best interest of the child would be to stay in the country.[65]

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[64] Netherlands - Court of the Hague, *Applicant v The State Secretary of Security and Justice*, AWB 16/3574, 23 December 2016.

[65] *Ibid.*

For refugee children article 3 (best interests of the child) is closely related to article 12 which ensures the respect for the views of the child. This fact is emphasised by the fact that originally article 12 was first proposed by the United States of America as paragraph 2 of article 3.[66] The heading of the article was reformulated from "the child's right to express opinions" to "respect for the views of the child".[67] A much discussed part of the article concerned what was to be considered "the age of reason".[68] The final draft reads "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

The Convention protects the right of children deprived of a family under article 20 by claiming their right to "special protection and assistance provided by the state" that shall "ensure alternative care for such a child" such as "foster placement, kafalah of Islamic law,[69] adoption or, if necessary, placement in suitable institutions for the care of children" with due regard to the "child's ethnic, religious, cultural and linguistic background".[70] While the original Polish draft defended further the maintenance of the child in the family environment,[71] nevertheless, after a suggestion from the delegation of Norway this was deleted from the article.

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[66] United Nations Office of the High Commissioner for Human Rights (ed.), *Legislative History of the Convention on the Rights of the Child, Volume II* (2007), at 437.

[67] *Ibid.*

[68] *Ibid.*, at 439.

[69] Legal adoption under Islamic law.

[70] Article 12 of the Convention on the Rights of the Child.

[71] It is important to remember that the original draft of the Convention defined the primary rights of parents as essential to the rights of the child and, in this context, the importance of children's relations with their parents and vice-versa were highlighted throughout the document.

**Articles 22 and 39 - Right to Special protection, Humanitarian Assistance and Reintegration**

Another essential article for the protection of unaccompanied refugee minors coming to Europe is article 22 which guarantees the right to "appropriate protection and humanitarian assistance" under national and international law. Whilst the article provides that the unaccompanied minor should be provided with the services given to those deprived of their family environment, as defined in article 20 of the same Convention, this article fails to recognise the special needs of refugee children in terms of care. While the Denmark delegation's suggestion for the inclusion of a new paragraph 4 in article 11 to assure the "special protection and assistance" needed by the child refugee, it was later changed by the Chairman of the Working Group to be replaced with "adequate protection and assistance"[72] and later reduced its legal strength to "appropriate protection and humanitarian assistance"[73]. Special protection is also protected under article 39 which recognises the need for children to be provided reintegration efforts when they have been subjected to "neglect, exploitation, or abuse; torture or any other of cruel, inhuman or degrading treatment or punishment; or armed conflict" to promote "health, self-respect and dignity of the child".

**Article 37 and 40 - Rights of Children Deprived of their Liberty and the Administration of Juvenile Justice**

Articles 37 and 40, considered here in conjugation, were not included in the original Polish draft but the topic was introduced into discussion by the Colombian delegation and developed in particular by Norway and Sweden as well as NGO groups.[74] It writes into the Convention the rights of children deprived of their liberty and the administration of juvenile justice. The most important parts of article 37 surround statement that the "every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so" and "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment"

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[72] United Nations Office of the High Commissioner for Human Rights (ed.), *supra* note 66, at 556.

[73] *Ibid.*, at 561.

[74] *Ibid.*, at 738.

and the right of the child "to prompt access to legal and other appropriate assistance". It fails, however, to define that detention in itself is cruel, inhuman and degrading to the child's development. Nevertheless, as the deprivation of liberty, namely in the form of detention, continues to be practiced all over the world, there are several additional international mechanisms which determine the rights of minors who are in this situation. Undoubtedly, it is clear that some countries consider that child justice systems. When Article 40 was adopted there was hope it would be the needed impulse to transform child justice systems from a punitive approach to one more aligned with the best interests of the child but this has not been the case.[75] This article enshrines the right of children to be "informed promptly and directly of the charges against him or her (...) and to have legal or other appropriate assistance in the preparation and presentation of his or her defence". This, as we will see next, is not the case in several unaccompanied minor who are detained. While the delegation of the UK suggested that paragraph 2 should include that "penal law and penitentiary system shall only be used in cases where child welfare procedures and facilities are considered".[76] Likewise, the comment of the Social Development Division, Centre for Social Development and Humanitarian affairs also highlighted the fact that the article failed to address the fact that "children, in principle, should neither be considered criminally responsible, nor be incarcerated"[77] and did not address the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).[78] While progress has been made at formal level, creating juvenile courts, this area of the justice system, globally, still remains largely unchanged. While Van Bueren (2006) describes several states as attributing this to a lack of funds, it is clear the issue steams also from a wider disregard for human rights and different cultural

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[75] G. Van Bueren, *Article 40: Child Criminal Justice. A Commentary on the United Nations Convention on the Rights of the Child* (2006).

[76] United Nations Office of the High Commissioner for Human Rights (ed.), *supra* note 66, at 749.

[77] United Nations Commission on Human Rights, *supra* note 54.

[78] United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules')*, adopted by the General Assembly in resolution A/RES/40/33, 29 November 1985, available at http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf (last visited 3 August 2017] (from here on Bejing Rules].

conceptions of children.[79] As Perry and Bentley regard, the interpretation of the Convention on the Rights of the Child cannot be culturally relativist while denying the other rights in it enshrined.[80] Additionally, as it is common when it comes to penitentiary law, there is a large absence of information and this aspect should not be defended on the account of lack of resources. Indeed, this is an aspect which can be changed through the resort to international experts, funds and international, regional and regional cooperation. Nevertheless, most states have appeared to accept the Convention as having a binding force, even though it is formally a non-binding instrument. The European Court of Human Rights has adopted an alternative approach in which it considers that articles of the Convention are binding insofar as they are also protected by the European Convention of Human Rights.[81] Article 40 enshrines many new rights such as minimum age and the promotion of the child's sense of dignity and worth as a fundamental principle of the child criminal justice system. Essential for the protection of children's rights was the CRC committee when it stated that the duties of the state apply to all minors regardless of whether national law treats them as being adults. Article 40 paragraph 3 reads that State Parties should seek "to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children", which goes beyond what had been agreed regarding article 14(4) of the CCPR that only specifies that procedures concerning juveniles should take into account "their age and the desirability of promoting rehabilitation". Nevertheless, the use of the phrase "seek to promote" means there is not an actual obligation created. As a result, the article should be read within the context of regional provisions as they are the ones that would provide the right to petition and obtain a remedy for violations of the child's criminal justice entitlements. Additionally, Van Bueren defends that the article fails to provide the minor with further protection due to the tension within that provides that child protection should

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[79] Van Bueren, *supra* note 75.

[80] Bentley, 'Myths, Wagers, and Some Moral Implications of World History', 16 *Journal of World History* (2005) 51.

[81] European Commission for Democracy through Law (Venice Commission), *Opinion on the Implications of a Legally-Binding EU Charter of Fundamental Rights on Human Rights Protection in Europe (CDL-AD (2003) 92)*, Opinion no. 256/2003, (2003), available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2003)022-e (last visited 14 September 2017].

not rest upon lawyers yet recognising that the traditional juvenile justice system is dependent upon lawyers.[82] However, it could be argued that the existing tension is purposeful as it could seek to provide an alternative to an existing system, that of the dependence upon lawyers, into a different one in which child protection is not reliant on them. Nevertheless, as the existing system does, indeed, depend on lawyers for the protection of detainees rights, it is essential that full access to some form of legal counsel is assured. Additionally, I agree with Van Bueren when he states that there are provisions missing when it comes to "no repetition of the rule against double jeopardy, separation of convicted and unconvicted children, the prohibition on the imposition of a heavier penalty and the opportunity for offenders to benefit from lighter penalties, or an entitlement for compensation for child victims of miscarriages of justice".[83]

The main principles defended both in the Beijing Rules and the CRC article 40(1) are that the well-being of the child must be ensured in the administration of child criminal justice, which implies the protection of other rights such as the assurance of contact with family whenever possible. In the case of unaccompanied minors this might simply not be feasible but always and in particularly in those situations when the child possesses family within the European region, a considerable effort must be made by the competent authorities to contact their families. Article 40 paragraph 1 also states that the child should be in an environment that promotes their sense of dignity and the respect for human rights. More importantly, it states that any treatment should take into consideration the age of the child and their reintegration. This is particularly relevant in the case of unaccompanied refugee minors. While Van Bueren and the former representative of the UN Centre for Social Development and Humanitarian Affairs defend that the article fails to be in line with article 14(4) of the ICCPR which incorporates the concept of "rehabilitation". I would argue that reintegration programmes can be more important for the well-being of the child, as the term "rehabilitation" can allow for programmes which do not ensure the well-

[82] Van Bueren, *supra* note 75.

[83] *Ibid.*, at 8.

being of child in the name of rehabilitating them[84]. Moreover, the term and the interpretation of "reintegration" denies the idea of the juvenile criminal as a menace to society but rather envisions their return to society as the main goal of the punishment, which is the opposite of the manner in which the outlaw is envisioned in the CCPR "rehabilitation". Detention, nevertheless, can never be productive in the production of true rehabilitation or re/integration. As the judgment of Judge Morenilla of the European Court of Human Rights reveals, as the promotion of child's rights intensifies, legal actors prioritise the CRC over the ICCPR in this matter - "(...) the necessary protection and assistance so that they can fully assume their responsibilities within the community" while preparing them "to live an individual life in society" through the promotion of "the establishment of laws, procedures, authorities and institutions applicable to children alleged as, accused of, or recognised as having infringed the penal law"[85]. Additionally, other procedural guarantee, in accordance to articles 40(2)(a) and (2)(b)(i), must be assured such a child being protected under the principle of the non-retroactivity of the law and being presumed innocent until proven guilty. Also, the minor should have the right to, according to Article 40 (2)(b)(ii), have their legal guardians notified immediately or within the shortest possible time. This is only relevant for unaccompanied refugee minors when these flee to Europe seeking to meet their parents or other legal guardians who are already on the continent. Otherwise, they are oftentimes only assigned legal guardians after their detention or deprivation of liberty has taken place.

When the case has not been diverted to other channels outside the juvenile justice system, the child is assured the right to have the issue determined by a "competent independent and impartial authority or judicial body".[86] This broad paragraph allows itself to cover the existing variety of juvenile justice throughout the world while also protecting the "best interest of the child, in particular taking into account his or her

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[84] An example of this would be para-military camps in the United States of America which focus on rehabilitation rather than reintegration (*Ibid.*, at 12.)

[85] ECtHR *Nortier v Netherlands,* Appl. no. 13924/88, Judgement (Mertis) of 24 August 1993.

[86] Article 40(2)(b)(iii) of the Convention on the Rights of the Child.

age or situation, his or her parents or legal guardians".[87] Again, Judge Morenilla defended the application of this principle in the European Court of Human Rights, referring to article 25 of the UDHR and the CRC to state that "minors are entitled to the same protection of their fundamental rights as adults but that their developing state of personality - and consequently their limited social responsibility - should be taken into account in applying article 6 of the Convention. In particular, the right of everyone charged with a criminal offence to be judged by an impartial tribunal should not be incompatible with the protective treatment of juvenile offenders".[88] The child is also entitled to the presence of legal or other appropriate assistance and while Van Bueren argues that it is not important that children are always granted formal legal assistance, a UNITAR study found that the right to counsel can be more important for children precisely due to the informality of juvenile proceedings.[89] Indeed, I would argue legal counsel is fundamental in every step of the asylum granting process for unaccompanied minors since it can be a preventative measure, as well as a remedial one, which ensures the rights of children and refugees. In addition to these guarantees, article 40(2)(b)(v) and (vi) repeats standards that already exist in binding instruments - the right to examine witness, entitlement to have their conviction and sentence reviewed by a higher tribunal, entitlement to free assistance of an interpreter. Article 40(3) provides that State Parties should "seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children" which goes beyond the ICCPR that merely states "take into account their age and the desirability of promoting rehabilitation".[90] Nevertheless, while the phrasing "seek to promote" is not ideal, in that it does not impose an obligation upon the state, it is good to remember that the language here used is one for non-binding documents.

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[87] Article 40(2)(b)(iii) of the Convention on the Rights of the Child.

[88] ECtHR, *Nortier v Netherlands*, p.290.

[89] Pappas, 'Law and the Status of the Child LII–LIII', 13 *Columbia Journal Human Rights Review* (1981).

[90] Van Bueren, *supra* note 75.

State Parties to the Convention on the Rights of the Child should establish a minimum age of criminal responsibility. While there is room to adapt the minimum age to cultural and historical aspects, the truth is that if the age of criminal responsibility is too low it loses its meaning at all. Considering the heated discussion often had at the Palais des Nations in discussions concerning children and their independence, it is understandable that the Committee on the Rights of the Child has not taken the initiative of establishing a universal minimum age of responsibility. While Van Bueren argues that the disparities in the minimum age of criminal responsibility between cultures are due to differences in maturity rates between countries I would counteract it with the fact that, even if the tasks children are expected to carry out are distinct from culture to culture, their biological development, including their brain development, occurs in the same manner in the entire world and the setting of a universal minimum standard for a minimum age of criminal responsibility would greatly benefit the protection of children's rights. Indeed, as countries like the Philippines plan to change the minimum age of criminal responsibility to nine years of age and several countries throughout the world setting it only slightly above this,[91] I would claim it is essential that a minimum age of criminal responsibility is established, while acknowledging that the negotiations for the drafting would be lengthy and difficult.

In Europe, the change of setting a minimum age of criminal responsibility was declined by the European Court for Human Rights in the case of V v UK when it was faced with the accusation that the current low minimum age of responsibility amounted to inhuman or degrading treatment under Article 3 of the European Convention, claiming that there is no commonly accepted minimum age of criminal responsibility for the imposition of criminal responsibility.[92]

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[91] Child Rights International Network, *States Lowering Age of Criminal Responsibility*, available at /en/home/what-we-do/policy/stop-making-children-criminals/states-lowering-age-criminal-responsibility (last visited 6 September 2017].

[92] ECtHR *V v. United Kingdom,* Appl. no. 24888/94, Judgement of 16. December 1999.

Article 40 (4) is highly important for unaccompanied minors as it places a duty on State Parties to make available a variety of dispositions as alternatives to institutional care. Van Bueren poses foster care as an alternative to institutional punishment which requires "careful State support and monitoring as the opportunities for abuse are well documented".[93] Diversionary procedures can only be applied when the minor has been declared guilty.

**Other Rights of Unaccompanied Minors Seeking Asylum**

Beijing Rule 7 recommends that children should be entitled to the right to silence as a "basic procedural safeguard" as they might be more vulnerable to confess under pressure. The CRC demands are more abated, demanding only that the child should not be compelled to give testimony or to confess guilt.[94] Additionally, Rule 7.1 safeguards the right to counsel and the right to appeal to a higher authority. Rule 15 of the same document reinforces the right of the juvenile to be represented by a legal adviser. However, the Beijing rules are non-binding and as such can only be contested in the legal system if incorporated into national legislation. Nevertheless, even as non-binding, they have their power as advisory legal document. Furthermore, Beijing Rule 10(3) recommends that all law officials who come into contact with children should "avoid harm to her or him with due regard to the circumstance of the case" such as "the use of harsh language, physical violence or exposure to the environment".

Rules are not just negative, forbidding certain aspects of conduct, but they are also positive, seeking to preserve and actively promote rights. For instance, article 14(3) (a) of the CCPR provides that everyone should be informed promptly in detail of any charges in a language they can understand and the interpretation provided by the Human Rights Committee states that this applies to all cases concerning criminal charges, regardless of the detention status of the person. Additionally, under article

[93] Van Bueren, *supra* note 75, at 30.

[94] *Ibid.*, at 21.

14(3)(b) children are entitled to have adequate time and facilities for the preparation of their defence which includes access to documents, any material evidence and counsel.In regards to detention, rule 17 (b) and (c) reinforce that deprivation of liberty should only occur in exceptional circumstances and after careful consideration. Moreover, rule 19 states that the placement of a juvenile in an institution should always be used as a last resort and for the minimum necessary period. As we will see further ahead, this is not observed in the case for the majority of detained unaccompanied asylum seeking minors, who are not deprived of liberty in detention centers as a last resort nor for the shortest amount of time possible.

What must be highlighted here is that both the Beijing Rules and the CRC were drafted with the notion that any involvement in the child criminal justice can be harmful *per se*.[95] Moreover, another principle enshrined in these international law instruments is that the concept of criminal responsibility should be related to the age at which children are able to understand the consequences of their actions.

**Torture, inhuman or degrading treatment**

"The prohibition of torture and other cruel, inhuman or degrading treatment or punishment is at the core of modern human rights law".[96] Torture is considered by the 1975 General Assembly as an aggravated form of cruel, inhuman or degrading treatment, whereas the European Court of Human Rights claims that torture must be addressed separately so as to address the "special stigma to deliberate inhuman

[95] *Ibid.*, at 30.

[96] W. Schabas, H. Sax and A. Alen, *Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment, and Deprivation of Liberty: A Commentary of the the United Nations Convention on the Rights of the Child* (2006), at 12.

treatment causing very serious and cruel suffering"[97]. One can argue that life imprisonment and the death penalty constitute more extreme forms of torture and cruel, inhuman or degrading treatment or punishment. While Scahbas and Sax (2006) argue that the inclusion of life imprisonment and death penalty limits the scope of application of the article in light of the previously mentioned analysis, the truth is that there is value to mentioning these crimes and creating specific provisions that directly protect the child from these human rights abuses.

The definition of torture as defined in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is widely accepted[98] - "torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes such as obtaining from hum or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing hum or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions". Although not all countries explicitly forbid torture, it is, in fact, punishable under criminal law prohibitions of assault. Nevertheless, there should be special provisions in domestic law regarding the practice of torture since the prohibition of assault does not allow for the consideration of the position of power of the state official who practices it and does not take into account the possible systematic practice of torture.

In regards to the cruel, inhuman or degrading treatment or punishment, these acts are treated by the Convention Against Torture as minor forms of torture. The Committee

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[97] ECtHR *Ireland v United Kingdom*, Appl. no. 5310/71, Judgement of 18 January 1978, paragraph 167.

[98] An exception to this are ad hoc criminal courts which have approach the matter of torture differently by rejecting the need for it to be carried out by a "public official" since it goes against the application of individual criminal responsibility found in international humanitarian law (see *Prosecutor v. Miroslav Kvocka et al. (Trial Judgement)*, IT-98-30/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 November 2001, available at: http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf [accessed 14 September 2017])

on the Rights of the Child has emitted commentaries that reveal a consideration of acts such as certain conditions of detention, solitary confinement, corporal punishment, police brutality and sexual violence as forms or cruel, inhuman or degrading treatment or punishment.[99] Schabas and Sax call attention to the fact that cruel, inhuman or degrading treatment can sometimes take the dimension of ethnic persecution.[100] Countries have been as contributing to torture when they practice *refoulement* and thus endanger children to be victims of this human rights violation. Although Schabas and Sax actively disregard this matter, this is extremely relevant for the case of asylum seeking minors coming to Europe nowadays.

**Article 37 - Deprivation of Liberty**

The paragraphs of article 37 of the Convention on the Rights of the child, regulating the deprivation of liberty of children, address a matter which has been described as the embodiment of "every social problem has a corresponding detention structure".[101] Deprivation of liberty has been present in international human rights instruments since the UDHR and the ICCPR before it was present in the CRC and, although similar in some aspects, they diverge in others. The ICCPR elaborates on the UDHR by adding requirements of lawfulness, release on bail, habeas corpus, introduction of a set of standards on conditions and treatment during deprivation of liberty, the separation of juveniles from adults at all stages and the right to compensation for unlawful arrest or detention. The CRC fails in addressing important matters like the right to liberty and security, right to information upon arrest, right to be brought before a judge or other competent officer and right to compensation. Nevertheless, this is, in part, compensated by the Committee on the Rights of the Child recommendations which refer to the Beijing Rules, Riyadh Guidelines, Juvenile

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[99] United Nations Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, 1 September 2005, available at http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf (last visited 19 August 2017].

[100] Schabas, Sax and Alen, *supra* note 96, at 19.

101 Mendes, E. (1994) Children and Juveniles in Detention in Children in Trouble - Children and Juveniles in Detention: Application of Human Rights Standards, UN Expert Group Meeting

Detention Legal Rules, Guidelines for Action on Children in the Criminal Justice System, the Standard Minimum Rules for the Treatment of Prisoners, Code of Conduct for Law Enforcement Officials, Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Tokyo Rules and Basic Principles for the Treatment of Prisoners While Schabas and Sax argue that the CRC aims to be complemented by the ICCPR and the UDHR and that it just does not mention these rights directly, the truth is that not all States Parties to the CRC are part of the ICCPR and broader protection is awarded to children . Deprivation of liberty itself has never been seen as interfering with a right in itself, but rather regarded as a legitimate form of sanction. Nevertheless, there are minimum standards of rights that must be assured in the deprivation of liberty, namely detention, for all and others for children in particular. As Schabas and Sax point out, there are several reasons given for the restriction of personal liberty of children such as "public order and state security considerations, punishment, concerns of protections of others or even the child itself".[102] All of this has a fundamental impact on the development of the child - the lack of social interaction, learning opportunities and the freedom of choice are all taken away in detention. In the United Nations Rules for the Protection of Juveniles Deprived of their Liberty the principle that "juveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural right to which they are entitled under national or international law, and which are compatible with the deprivation of liberty".[103]

Following this, article 37 paragraphs (b) (c) and (d) were at first not included but the 1979 revised Polish draft appealed for the inclusion of unspecific special treatment

[102] Schabas, Sax and Alen, *supra* note 96, at 34.

[103] Rule 13 of United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, adopted by resolution A/RES/45/113, 2 April 1991, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/JuvenilesDeprivedOfLiberty.aspx (last visited 5 September 2017] (from here on: United Nations Rules for the Protection of Juveniles Deprived of Their Liberty].

and privileges for children in the penal system, prohibiting capital punishment and called for punishments' adequate to the particular phase of the child's development.[104] The last version of the draft supported the idea that children should be deprived of the liberty as rarely as possible and that special provisions should be made that take into account their age and development. Deprivation of liberty is here applicable to all deprivations of liberty - "criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc".[105] It must be understood first and foremost as a standard to protect the personal liberty of the child, as it allows it to protect the State Party's obligation to ensure the child's most conducive personal development as a general principle of the CRC (article 6(2)). Another argument for the avoidance of deprivation of liberty to the danger of "criminal contamination" when submitted to the criminal justice system and the specific dependency and vulnerability of children to abuse, victimisation and the violation of their rights". While the right to personal liberty is not referred specifically in the CRC, it is already contemplated in the UDHR article 3 and the concept itself is imbedded in the standards concerning deprivation of liberty. Personal liberty refers to freedom of bodily movement in the narrowest sense. The obligation to respect the right of the child to personal liberty demands that States Parties to refrain from interference without the proper justification by international and national law. Article 37 (b) requires that deprivation of liberty must pass certain criteria such as lawfulness and non-arbitrariness and must pass specific tests such as being a measure of last resort and for the shortest amount of time necessary.[106] Otherwise, the child's right to personal liberty is violated. Moreover, the State Party has an obligation to protect the child from interferences by private actors such as from child trafficking networks and other exploitative situations.[107] Additionally, the State Parties have an obligation to fulfil requires them to realise the child's liberty through

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[104] Schabas, Sax and Alen, *supra* note 96, at 51.

[105] United Nations Human Rights Committee (HRC), *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, 30 June 1982, available at http://www.refworld.org/pdfid/4538840110.pdf (last visited 19 August 2017], para. 1, o.c. (note 308].

[106] Schabas, Sax and Alen, *supra* note 96, at 82.

[107] Article 35 and article 36 of the Convention on the Rights of the Child.

comprehensive positive action as argued in the General Comment on General Measures of Implementation of the Committee on the Rights of the Child. This can be ensured through the training of professionals, namely with non-violent methods of discipline and alternatives to institutionalisation. Measures pertaining to specific standards against the deprivation of liberty of minors would be actions like ensuring the registration of all detained persons, monitoring mechanisms and internal effective complaint procedures to address and investigation violations of these standards.

When taking into account the four guiding principles identified by the Committee on the Rights of the Child,[108] namely the realisation of rights for all children without discrimination, we must realise this is particularly relevant as unaccompanied minors are often deprived of their freedom on European soil due to their nationality, religion, gender or race. According to the principle of non-discrimination, this should not affect their access to education or healthcare. Although for unaccompanied minors their education has already been disrupted even before they are detained, the placement in detention centres contributes to further this situation. Nevertheless, JDL Rules state that children should be provided with education "suited to his or her needs and abilities and designed to prepare him or her for return to society"[109] and should be provided "outside the detention facility in community schools wherever possible"[110]. The access to healthcare under JDL Rules provide that "every juvenile shall receive adequate medical care, both preventive and remedial".[111] Article 37 (b) calls that deprivation of liberty be used only as a "measure of last resort" and "for the shortest appropriate period of time" and must take into consideration, thus, the impact this will have on the child's development and its personal future. As Schabas and Sax state, unaccompanied minors are particularly vulnerable to the environment of detention as "frequent contact by police and security organs certainly does not create a setting for 'appropriate protection and humanitarian assistance" which is demanded

[108] United Nations Committee on the Rights of the Child, *supra* note 41, o.c. (Note 308), paragraph 12.

[109] Rule 38 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

[110] Rules 13, 16, 17, 22, 24 and 26 of the Beijing Rules.

[111] Rule 39 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

by article 22 of the CRC. Moreover, taking into account rule 17(1) of the Beijing Rules that states that "a juvenile should not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences", an act like the unlawful entry into a country cannot justify the administrative detention of child refugees[112]. This has been supported by the UNHCR since 1988 that no child refugee should be detained[113], adding that delays in being brought before a judge should not exceed a few days[114]. Article 37 (c) calls for every child to be treated with respect and dignity while taking into consideration the special needs of a person their age. The fact that this provision highlights the importance of an age-sensitive approach is essential when dealing with the rights of minors as the needs, both physical and psychological, of a toddler and a teenager differ greatly. For instance, when in detention, children must be at least in separated quarters from adults.[115] Article 37 (d) of the CRC ensures procedural guarantees for children such as the right to prompt access to legal and other assistance, the right to challenge the legality of the decision leading to deprivation of liberty and the right to a prompt decision on this matter. The best interest of the child in the context of detention seeks to ensure that there is a child-oriented view embedded in it. Article 12, which ensures the right to participation of the child, is particularly challenged in situations of deprivation of liberty as the unaccompanied minors are in a specifically vulnerable position and efforts should be made in order to ensure that this right is respected through the adoption of mechanisms that guarantee that the child is given proper counsel and heard while investing in the education of officials.

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[112] Schabas, Sax and Alen, *supra* note 96, at 86.

[113] United Nations Commissioner for Refugees (UNHCR), *supra* note 9.

[114] United Nations Human Rights Committee (HRC), *supra* note 105, at 2.

[115] Article 10 (2)(a) of the ICCPR, Rule 13 (4) of the Beijing Rules, Rule 8 of the United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders and Approved by the Economic and Social Council by Its Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977*, 30 August 1955 1.

As it is stated in Beijing Rule 5.1 the juvenile justice system should "emphasise the well-being of the juvenile" and be proportionate to the circumstances of the offenders and the offence. The detention or deprivation of liberty of unaccompanied asylum seeking minors, argued as a preventative measure, violates this principle of proportionality.

**Where do the Rights of the Unaccompanied Minor Seeking Asylum Lie?**

In conclusion, although complex, the best interest of the child should be individualised, considered on a case by case basis, and, even if some principles can be said to be generally in the best interest of the child, such as family reunification or education, the truth is that access to these situations can expose the minor to other dangers that would undermine that same interest. Indeed, as we have seen above, there are different principles and rights which come into play to assure that the special conditions and needs of children are addressed in a proper manner in a variety of settings. One of these settings is detention, in which some rights of the child are inevitably violated, but others can be kept even in conditions of deprivation of liberty. As a guiding principle, the best interest of the child must be applied at all stages of child development and to all decisions, being that it should never be used to deny the child access to one of the rights enshrined in any of the international conventions that protect their rights. Though the principle is applicable to all situations regarding children, the truth is that there are situations which are not directly addressed by the Convention on the Rights of the Child or which are more easily interpreted by reading them alongside other advisory or binding legal documents as well as the opinions of experts.

## EUROPEAN AND INTERNATIONAL FRAMING

In the international arena, while some international legal documents have monitoring bodies, such as the Committee on the Rights of the Child for the Convention on the Rights of the Child and its additional protocols, other institutions possess actual enforcing power, such as the International Criminal Court created by the Rome Statute or the European Court for Human Rights. As such, when analysing the legality and legal reasoning of actions carried out regarding unaccompanied refugee minors, as well as in order to be able to take into consideration into an European jurisprudence that begins to take form, we must look at European and national European legislation in a comprehensive manner.

The European Convention on Human Rights, drafted in 1950, fails to provide for any specific rights for children.[116] However, through domestic legislation, additional European legal documents and jurisprudence, the European Court for Human Rights has managed to find a way of accommodating children's welfare into their decisions. Indeed, the Treaty on the European Union, as well as the Charter for Fundamental Rights of the European Union, set as a goal the promotion of the protection of the rights of the child which must take into consideration the best interest of the child as well as ensuring the right to asylum, [117] something which is also emphasised in the European Social Charter, as well as the right of children to protection and the right to social, legal and economic protection.[118] Moreover, European countries also developed international legal documents related to the rights of the child, for example, the best interest of the child are protected under the European Convention on the Exercise of the Children's Rights, [119] which states that judicial authority shall take into account the best interest of the child in the decision-making process. Related

[116] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos. 11 and 14*, 4 November 1950 (from here on: ECHR).

[117] Articles 18 and 24 ECHR.

[118] Article 7 and 17 ECHR.

[119] Article 6 ECHR.

to children's rights are also provisions in other legal instruments such as the Treaty on the Functioning of the European Union, for example, when it comes to the implementation of measures fighting human trafficking and discrimination. [120]

The main European directive on the reception standards for refugees makes, in its very first paragraphs, an important commentary that should serve as the foundation for analysing how the rights of refugees are conceptualised by European governments - "A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice", [121] namely with one of the objectives of the legal document as being explicitly "the harmonization of conditions for the reception of applicants should help to limit the secondary movements of applicants influenced by the variety of conditions for their reception"[122]. Unfortunately, refugees are often seen as an issue that must be addressed as a border security problem, rather than a matter of upholding international human rights commitments. [123] In matters of detention, the Member States also have the duty to uphold the standards of provision of healthcare, ensuring due diligence, proper and accurate records of detention, the possibility of a prompt judicial review of the lawfulness of the detention, while the detainee is entitled to free legal assistance and representation while being informed, in a language they can understand, and told the motive for their detention. [124] Again, while the directive protects the rights of detainees while they are in the detention facility, normally through ensuring the right to communicate with family, receive legal counsel, the right to open-aired spaces and being properly notified of their

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[120] Articles 10 and 79 ECHR.

[121] Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 Laying down Standards for the Reception of Applicants for International Protection*, OJ L. 180/96-105/32, 29 June 2013, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033 (last visited 17 August 2017], at 1 (from here on: Directive 2013/33/EU].

[122] Directive 2013/33/EU, p.2.

123 As an example, refugee matters in Portugal are not handled by the Ministry of Foreign Affairs, which has a section dedicated to human rights, but rather by Serviços de Estrangeiros e Fronteiras (Foreign and Border Services). For more on this matter see Lei Orgânica dos Serviços de Estrangeiros e Fronteiras

[124] Article 9 of Directive 2013/33/EU.

obligations and rights. [125] Nevertheless, the directive severely fails in protecting the rights of asylum seekers concerning detention as, although it provides them with some judicial guarantees, it allows for a number of exceptions to the illegality of detention of an asylum seeker who has not committed or is suspected to have committed a crime. Indeed, the directive allows for exceptions in order to verify or determine identity or nationality, determine elements for international protection, the right to enter territory, if the person is subject to a return procedure as contained in directive 2008/115/EC[126], for matters of national security or public order and for determining which country is responsible for examining an application for international protection.[127] However, these allowances are directly in conflict with several human rights provisions which specifically state that asylum seekers must not be deprived of their liberty merely because of their condition as such. Indeed, Member States have excused the deprivation of liberty of asylum seekers by claiming that it is a necessity for national security to have each candidate adequately assessed before allowing them to enter the country in conditions of non-deprivation of liberty.[128] The issue with permitting detention to take place legally whenever "national security or public order" demand it is that a large influx of asylum seekers, like the one we have seen in Europe since 2015,[129] can easily became an argument for severely limiting the human rights of an entire group of people. Not only a direct violation of human rights, this rhetoric also feeds a discriminatory, xenophobic, often islamophobic, narrative that is contrary to the principles of the various European human rights legal instruments and could lead down to a dangerous path to follow.[130]

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[125] Article 10 of Directive 2013/33/EU.

[126] Council of the European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*, OJ L. 348/98-348/107, 16 December 2008, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:en:PDF (last visited 2 September 2017].

[127] Article 8, paragraph 3 of Directive 2013/33/EU.

[128] Court of Justice of the European Union (ECJ), *EU Law Allows an Asylum Seeker to Be Detained When the Protection of National Security or Public Order So Requires*, Press release, 13/16 (2016), available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-02/cp160013en.pdf (last visited 14 September 2017].

[129] FRONTEX, *Main Migration Routes into the EU/ Land & Sea*, 4 August 2017, available at http://frontex.europa.eu/trends-and-routes/migratory-routes-map/ (last visited 14 September 2017].

[130] See for example European Islamophobia Report, *2016 Reports*, available at http://www.islamophobiaeurope.com/reports/2016-reports/ (last visited 14 September 2017].

For unaccompanied refugee minors, considered under the additional provisions of the directive regarding vulnerable people and people with special needs as they are specifically mentioned in the directive, there are exclusive rights that serve to provide extra care and protection. In fact, the directive underlines that mental health of the vulnerable or those with special needs should be a paramount concern, which I would argue is not achieved by subjecting them to conditions of deprivation of liberty. Indeed, the article itself states that minor asylum seekers should be detained only as a measure of last resort and for the shortest amount of time possible. However, there are viable alternatives to detention that allow for the appropriate monitoring needed for any minor without potentially causing as much mental health damage as the current situations of deprivation of liberty.[131] Indeed, the directive itself emphasises the need for efforts to be made in order to avoid detention, stating that "(asylum seeking minors) should never be detained in prison accommodation" and also "(…) never with adults". Supplementary measures are assured for female asylum seekers such as female-only quarters. Additionally, asylum seeking minors also have the right to have their privacy and their data adequately protected when they are under detention[132]. When it comes to education, the directive, against what is defended in most human rights legal documents, states that education efforts may be postponed up until three months.[133]

Although in the founding documents of the European Union as such, human rights, particularly the rights of the child, are highlighted, the truth is that unaccompanied refugee minors fail to be adequately protected by legal instruments or state institutions. By failing to address individual cases and dealing with each group altogether before analysing each individual case personally, the European Union fails to adequately address the vulnerabilities and special needs of unaccompanied minors from the start of the process. Moreover, as we will explore further later on, even

[131] K. Touzenis, *Unaccompanied Minors: Rights and Protection* (2006).

[132] Article 11 of Directive 2013/33/EU.

[133] Article 14 of Directive 2013/33/EU.

though European officials have the knowledge that a unaccompanied asylum seeking minor is under their responsibility they oftentimes do not act according to what has been defined as appropriate and recommendable conduct in the directives, adapted nationally, or the other human rights instruments ratified by the country.

Although part of the much needed legislative foundation is already in place, there is a severe lack in proper application of the law and in the assurance that adequate mechanisms and services are in place for unaccompanied asylum seeking minors. As we will see next, the failures of the application of the law occur during the different phases of the asylum seeking process and can potentially seriously affect the human rights of asylum seekers and carry long-term impact on the safety and psychophysical health of the asylum seeker. Additionally, as the following sections will demonstrate, there are severe legal lacunae in the treatment and care of unaccompanied asylum seeking minors. One of the most serious and human rights-abusing practices is the deprivation of liberty of unaccompanied and separated refugee minors for no other reason than their condition as such.

## ENTRY INTO THE COUNTRY

The journey to Europe begins a long time before a asylum seeker escapes their country. It is vital that any thesis that seeks to address the matter of asylum seekers and refugees does not fail to also acknowledge the geopolitical complexities that surround the causes for armed conflict.[134] Nowadays an armed conflict, be it international or non-international, in any country is affected by international politics, with states providing troops and/or air support, supplying weapons and economic help to the side they support.[135] Although the act of foreign intervention in wars is a centuries-old affair, not always necessarily morally wrong, [136] it is important that European countries recognise their own role in contributing to conflicts in the Middle East and that hopefully, as this becomes a more frequent narrative in the public sphere and contradicts the current one which depicts refugees as a burden and reception as charity, adopt a more receptive view to receiving refugees in their own continent. More importantly, however, the right to enter a country to seek international protection is enshrined in a number of legal documents to which all States of the European Union belong.

The 1951 Convention on the Rights of Refugees clearly states in Article 31 that asylum seekers are to be allowed to enter the country of reception, even when in illegal conditions. Indeed, States "shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened (…) enter or are present in their territory without authorisation, provided they present themselves without delay and show good cause for their illegal entry or presence". [137] In fact, legal entry is oftentimes not possible for an asylum seeker, many of whom are escaping their own governments and cannot,

[134] There are also refugees that have fear of persecution due to their religion, ethnicity, political belief, race or that are refugees due to climatic change. However, these matters often result in conflicts and, as this thesis aims to address the issue of unaccompanied refugee minors in Europe, we must recognise that the majority of them come from war-torn countries.

[135] Odermatt, 'Between Law and Reality: New Wars and Internationalised Armed Conflict', 5 *Amsterdam LF* (2013) 19.

[136] J. M. Owen, *Confronting Political Islam.* (2016).

[137] Article 31 (1) of the Convention on the Rights of Refugees.

therefore, even afford a legal and safe exit out of their own country. [138] Moreover, diplomatic structures and presence are sometimes also absent in countries in conflict, where there are also systematic structural breakdowns that make it impossible for most people to enter countries of destination legally. Their travel to European soil is expensive, extremely dangerous, not only because of the natural dangers to which they are exposed, but also at the hands of smugglers, human traffickers and other types of criminals who wish to take advantage of asylum seekers. Children, unaccompanied minors in particular, are specially vulnerable to these perils and, "no matter the motive, children often have little or no choice in the decisions that led to their situations"[139]. Indeed, for this very reason, they should be identified as such as early as possible, through pre-existing specific identification procedures for unaccompanied minors, registered through interviews and have a guardian with the necessary expertise appointed to them.[140] We must be aware that their vulnerability is not an inevitability but rather a consequence of their condition and, as such, although maybe not eliminated, it can for certain be mitigated through the creation of humanitarian corridors, proper training of law and border officials, adequate register procedures and prompt appointment of a guardian as well as placement in a short-term care facility, not in a detention centre.

Nevertheless, the Committee on the Rights of the Child denounces that often children are denied entry into a country or detained by border or immigration officers, in a clear violation of their rights.[141] The Committee enforces the above stated opinion - "illegal entry into or stay in a country by an unaccompanied or separated child may also be justified according to general principles of law, where such entry or stay is the only way of preventing a violation of the fundamental human rights of the child"[142].

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[138] European Union Agency for Fundamental Rights, *Legal Entry Channels to the EU for Persons in Need of International Protection: A Toolbox* (2015), available at http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf (last visited 13 September 2017].

[139] United Nations Commissioner for Refugees (UNHCR), *supra* note 9.

[140] *Ibid.*

[141] United Nations Committee on the Rights of the Child, *supra* note 99.

[142] *Ibid.*

Regardless of this, unaccompanied minors are always legally entitled to be properly interviewed and to have their case analysed for international protection, independently of their legal status in the country[143].

However, the European Directive on the rights of asylum seekers states that these may be detained in order to have their "right to enter territory" ascertained[144]. As it is not necessary to detain minors in order to ascertain their right to an asylum claim, their detention for this purpose violates the principle of detaining them solemnly as a "last resort" and for "the shortest time possible"[145], whilst failing to live up to the insurance that there must be an acceleration of all relevant processes. Placing unaccompanied minors in detention merely because they are seeking asylum is a grave violation of human rights practiced by the countries of reception, worsening the ability of these minors to trust in the authorities of the country and placing them further in a position of vulnerability. For instance, in the Upper Tribunal, Immigration and Asylum Chamber, in the United Kingdom case of the Queen on the application of ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM v Secretary of State for the Home Department, three unaccompanied minors, belonging to a larger group of seven asylum seekers from Syria, were refused admission into the country and kept in the "Jungle camp" in Calais. In their case before the tribunal, the Syrian asylum seekers argued that the refusal of the United Kingdom to admit them and, in this manner, refusing them the right to family reunification of the minors resulted in a violation of the European Convention on Human Rights article 8 on the right to family life.[146] Moreover, the infamously degrading conditions at Calais camps and the poor mental state of the applicants, who suffered from Post-traumatic Stress Disorder,[147] were factors that were also taken into consideration by the court when making a decision

[143] Directive 2013/33/EU.

[144] Article 8 (3) c) of Directive 2013/33/EU

[145] Directive 2013/33/EU.

[146] Council of the European Union, *Council Directive 2003/86/Ec of 22 September 2003 on the Right to Family Reunification*, OJ L. 251/12-251/18, 3 October 2003, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:en:PDF (last visited 11 September 2017].

[147] M. Bochenek and Human Rights Watch (Organization), *'Like Living in Hell': Police Abuses against Child and Adult Migrants in Calais.* (2017).

on the case in favor of the plaintiffs. Comparing the requirements and procedures practiced in France regarding asylum seekers and the granting of any form of international protection, the tribunal highlighted that had the applicants done the procedure in France it would be likely they would have been transferred to the United Kingdom at a later point if they had maintained their wishes to do so. Additionally, the shortcomings in relation to accommodation and other basic requirements and inappropriate conditions of reception for unaccompanied asylum seeking minors at Calais was an aggravating factor that should have prompted the United Kingdom to consider the request for international protection of the asylum seeking minors. On the other hand, the Secretary of State for the Home Department of the United Kingdom argued that since the applicants were illegally present in France and had made no application for entry clearance to their wished country of destination, choosing not to make use of the then applicable Dublin procedures, they should not be granted entrance into the United Kingdom. The tribunal concluded that the interference exercised by the United Kingdom's agency amounted to a "disproportionate interference"[148] of the rights enshrined in article 8 of the European Convention on Human Rights and article 7 of the European Union Convention for Fundamental Rights. As argued before, Member States often justify their violations of the rights of refugees by claiming that they did so in order to protect public order and ensure security, and, indeed, the Secretary of State for the Home Department claimed that it had complied with the Dublin regulation so as to respect the public interest and impose "orderly immigration control"[149]. Nevertheless, the tribunal concluded by deciding in favour of the applicants as they considered that the refusal from the Secretary of State for Home Department had been a disproportionate interference with the applicants' right to family life. In addition, the age of the three minor applicants, coupled with the psychological damage suffered and the potential further negative consequences for their health that could arise from a denied entry, were

[148] United Kingdom - Upper Tribunal (Immigration and Asylum Chamber), *The Queen on the Application of ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM v. Secretary of State for the Home Department*, JR/15401/2015; JR/154015/2015, 29 January 2016, available at http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/jr-15401-15405-2015-zat-others-final.pdf, paras. 51 and 54.

[149] *Ibid.*, para. 31.

contributing factors for the decision of the Upper Tribunal. Finally, the tribunal also claimed that an unjustified delay in family reunification, coupled with the absence of a parental figure for the minors while in Calais, supported their final decision even further. This case serves to illustrate the common different faces of the asylum seeking process for unaccompanied minors - on the one hand there is the unaccompanied minor, who has suffered from psychological, if not physical, trauma and is generally unaware, misinformed or incapable due to their maturity to navigate the request for international protection in a manner that favours them. For many minor asylum seekers nowadays, it is also frequent that, though they might travel alone to Europe, they have family currently living in the continent and wish to be reunited with them. On the other hand, the position of the United Kingdom agency shows that security and public order are oftentimes used as a pretext for countries not fulfilling their human rights obligations. While migration and international protection procedures should never be disorganised or endanger the country of destination, the human rights of asylum seekers, particularly those who are most vulnerable, cannot be violated according to European Union and international binding legal documents.

Entry into the country should not even be a matter to be discussed - when asylum seekers or migrants arrive they are not distinguishable and the repercussions of denying them entry can result in human rights violations, such as human trafficking, smuggling or slavery, not to mention death or injury. Entry to the country of destination or passage cannot be denied as the duration of the asylum determining or other form of international protection process is too long to be able to be carried out in a secure manner whilst the individual is maintained outside of the country. Moreover, the denial of entry into the country can also hinder the ability of the asylum seeker to provide evidence and make their case for their right to international protection.

## DETENTION OF UNACCOMPANIED ASYLUM SEEKING MINORS

"Detention is never in the best interest of the child" is a sentence one sees repeated frequently in any document that addresses the detention of minors. However, this situation persists and, when it comes to unaccompanied asylum seeking minors, it is even a greater violation of the principles surrounding their rights as humans, asylum seekers and children. Indeed, there is no advantage for the child that comes with deprivation of liberty alone, but there are many disadvantages that arise only from conditions of detention. Nevertheless, as the deprivation of liberty continues to be practiced in every country, even if not in the form of detention, numerous legal instruments and recommendations from international organisations and non-governmental organisations exist to regulate not only the deprivation of liberty of adults, but also taking into consideration the specific needs of minors.

Although the European Union possesses numerous conventions on human rights and on the duty to promote the protection of the rights of the child[150], its member states continue to practice the detention of unaccompanied asylum seeking minors for no any other reason than for the very fact that they are seeking asylum. This violates principles for the protection of children in several European legal documents[151][152] as well as the right to asylum[153] itself, since it hinders the process of access to international protection - "in application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained".[154] The practice of detention of unaccompanied minors violates prohibition of torture, inhuman or degrading

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[150] Article 3 of the Treaty on the European Union, European Union, *Treaty on European Union (Consolidated Version)*, 2008/C 115/01, 13 December 2007.

[151] Article 7 of the European Social Charter, Council of Europe, *European Social Charter (Revised)*, ETS 163, 1 July 1999.

[152] Article 24 of the Charter of Fundamental Rights of the European Union, European Union, *Charter of Fundamental Rights of the European Union*, 2012/C 326/02, 26 October 2012.

[153] Article 18 of the Charter of Fundamental Rights of the European Union.

[154] United Nations Committee on the Rights of the Child, *supra* note 99, at 17.

treatment under European and international legal instruments[155][156], the right to liberty and security, which should only be suspended when there is a "reasonable suspicion of having committed an offense or when reasonably considered necessary to prevent his committing an offense or fleeing after having done so"[157], being that the article also highlights that detention of a minor can only be "by lawful order for the purpose of educational supervision or (…) bringing him before the competent legal authority"[158]. Additionally, I would argue that the detention of unaccompanied asylum seeking minors furthers their vulnerability and exposes them even more to risks related to human trafficking, slavery and military recruitment[159] - "unaccompanied and separated children face greater risks of *inter alia* sexual exploitation, abuse, military recruitment, child labour and detention"[160], being that "there is often a link between trafficking and the situation of separated and unaccompanied children".[161] However, it is also made an exception for the "lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country".[162] However, the entry of asylum seekers into a country should not be prosecuted as it is not an illegal act that can be determined as such before the adequate international and national agencies determine the actual legal status of the asylum seeker and there is not enough sustained reasonable and continuous threat to national security or public order that would justify the detention of an asylum seeking minor upon entry into the country. In fact, this is expressively forbidden by the Convention on the Rights of Refugees, where it is stated that no penalties should be imposed when refugees enter the country illegally. However, unfortunately, the article

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[155] Article 3 of the European Convention on Human Rights.

[156] Article 4 of the Charter of Fundamental Rights of the European Union.

[157] Article 5 (c) of the European Convention on Human Rights.

[158] Article 5 (d) of the European Convention on Human Rights.

[159] Articles 79 and 83 of the Treaty on the Functioning of the European Union, European Union, *Consolidated Version of the Treaty on the Functioning of the European Union*, OJ L. 326/47-326/390, 26 October 2012; United Nations Committee on the Rights of the Child, *supra* note 99.

[160] United Nations Committee on the Rights of the Child, *supra* note 99, at 5.

[161] *Ibid.*, at 9.

[162] Article 5 (f) of the European Convention on Human Rights.

leaves room for exceptions to be made as it clarifies that this is to be the case only when asylum seekers are "coming directly from a territory where their life or freedom was threatened",[163] which is not the case for most asylum seekers who travel through countries of transit before reaching their country of destination. However, the Committee on the Rights of the Child underlines that states have obligations that apply to each child that comes under their jurisdiction or territory, namely those who come under it while attempting to enter it.[164] As such, this would not completely suspend their obligations as state parties to the Convention on the Rights of the Child and the Convention on the Rights of Refugees, being that, according to their international obligations, they cannot detain an unaccompanied minor solemnly for entering the country. Additionally, the Committee on the Rights of the Child calls attention to the fact that unaccompanied asylum seeking minors are routinely "denied access to asylum procedures or their asylum claims are not handled in an age and gender sensitive manner".[165] Moreover, the judicial authority is to take into account the best interest of the child in the decision-making process and, I would argue, it is never in the best interest of the unaccompanied asylum seeking minor to be detained solemnly for entering the country.[166]

**Rights of Asylum Applicants**

Indeed, detained asylum applicants are granted the right to have their detention to be as "short as possible" and in observance of the principle of due diligence[167]. The process and sentence must always be available for judicial review and the detainee must always be informed of the reasons for their detention in an age-appropriate manner. Moreover, they are entitled to free qualified legal assistance and

[163] Article 31 of the Convention on the Rights of Refugees.

[164] United Nations Committee on the Rights of the Child, *supra* note 99.

[165] *Ibid.*, at 4.

[166] Article 6 of the European Convention on the Exercise of Children's Rights, Council of Europe, *European Convention on the Exercise of Children's Rights*, ETS 160, 1 July 2000, available at https://rm.coe.int/168007cdaf (last visited 25 August 2017].

[167] Article 9 (1) of Directive 2013/33/EU.

representation[168]. However, this right is limited by article 9 paragraph 7[169] that states that Member States can reduce this right only to those who are deemed to financially need it and can also limit the amount of free assistance and representation provided[170].

During detention, asylum seekers are entitled to have certain conditions and rights assured - "conditions of detention must be governed by the best interests of the child"[171]. The detention of asylum seekers should not take place in a regular detention facility, but rather in a specialised one whenever as possible, where they will have access to open-aired spaces. Agencies like UNHCR must have the possibility of visiting the detainee, whom must be systematically informed, in a manner they can understand, of their rights and obligations and should also have the opportunity to communicate and receive visits from their families, legal advisers and non-governmental organisations in conditions that respect privacy. Nevertheless, these visits can be limited due to security, public order concern or administrative management[172]. Moreover, there are exceptions that suspend the general limitation of detention practices, such as when it is carried out to verify or determine identity or nationality of an asylum seeker, to determine other elements for international protection and the right to enter the territory, to subject the asylum seeker to a return procedure, for motives of national security or public order and in order to determine which country is responsible for examining the application for international protection[173].

**The specific case of unaccompanied minors as a vulnerable group:**

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[168] Article 9 (2),(3),(4),(5),(6) of Directive 2013/33/EU.

[169] Directive 2013/33/EU.

[170] Article 9 (8) of Directive 2013/33/EU.

[171] United Nations Committee on the Rights of the Child, *supra* note 99.

[172] Article 10 of Directive 2013/33/EU.

[173] Article 8 of Directive 2013/33/EU.

The obligations of states are not only negative but also positive, that is, they are not limited only to the prohibition of carrying out certain acts, but, rather, they extend to the creation of programmes and measures which promote the rights enshrined in the legal instrument.[174] The Committee on the Rights of the Child highlights that detention cannot occur merely because the child is unaccompanied or separated, due to their migratory or residence status and, when "exceptionally justified for other reasons", it should be used only as a measure of last resort and for the shortest amount of time possible. When it comes to unaccompanied minors then, it is not enough to receive them in the country, but nationally implemented procedures must be put in place that detect the minor as being unaccompanied and provide them with a guardian, legal counsel and any necessary additional assistance in terms of mental health support - "this principle (non-discrimination), when properly understood, does not prevent, but may indeed call for differentiation on the basis of different protection needs such as those deriving from age and/or gender".[175] States must bear in mind that the detention of unaccompanied asylum seeking minors is more easily perpetuated as they often do not speak the language, have a feeble or no grasp of the asylum procedure and do not have a guardian assigned to them. To help redress the balance, institutions should develop these procedures to allow for the opinion of the minor to be taken into account - "in all cases, the views and wishes of the child should be elicited and considered".[176]

Although asylum seeking minors, who do not have a guardian, have the right to have a guardian assigned to them by the state which represents the child's best interest and has the proper knowledge on how to act accordingly, [177] the state also has the duty to take into consideration the best interests of the child as a primary consideration for short and long term solutions[178] and it must be a guiding principle in determining the priority of protection needs and the chronology of measures which are adequate for

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[174] United Nations Committee on the Rights of the Child, *supra* note 99.

[175] *Ibid.*, at 8.

[176] United Nations Commissioner for Refugees (UNHCR), *supra* note 9, at 1.

[177] United Nations Commissioner for Refugees (UNHCR), *supra* note 9; Directive 2013/33/EU.

[178] United Nations Committee on the Rights of the Child, *supra* note 99.

unaccompanied minors.[179] This guardian should be used in administrative or judicial proceedings whenever needed to support the child and, when not available, this support should be provided by an organisation.[180] Legal counsel should also be available for every stage of the process. Indeed, under the main European directive coordinating the conditions of reception those vulnerable and with special needs are granted additional rights.

This is exemplified in the French case of the Administrative Tribunal of Lille, the non-governmental organization Medecins du Monde urged the relevant authorities to take urgent interim relief measures to guarantee the fundamental freedoms of the population in the refugee camp in Calais. Among these requests was the specific call for putting vulnerable persons under protection with ensured access to healthcare and food. Making use of French national legislation, the Court decided that, under Article L345-2-2 of the Code on Social and Family Action, those most vulnerable in Calais have the right to accommodation and healthcare and ordered a census of unaccompanied minors to be carried out in the following 28 hours and that measures should be taken to ensure better hygiene and safety conditions with eight days of the judgment[181].

Another example of the special consideration that must be taken when dealing with unaccompanied minors comes from the United Kingdom Court of Appeal case of DS v Secretary of State from the Home Department. The minor was an Afghani national who applied for asylum at the age of fifteen, which was refused, but was granted discretionary leave for further two years and a half since his safe return to his country of origin could not be ensured. The plaintiff first appealed this decision by arguing he was entitled to international protection status as a refugee since he feared persecution on the ground of being a member of a specific social group. The first court dismissed his appeal as he had failed to provide his mother's details to the International Committee of the Red Cross for the purposes of family tracing and possible

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[179] *Ibid.*

[180] United Nations Commissioner for Refugees (UNHCR), *supra* note 9.

[181] France - Adminsitrative Tribunal of Lille, 2 November 2015, Association MEDECINS DU MONDE et al., No 1508747

reunification and did not accept the fact that his uncle had been declared as missing. In the Court of Appeal two judges held that, in order to appeal the refusal of asylum, the plaintiff must have been able to demonstrate he was an orphan with origin in Afghanistan and that the Tribunal had fail to take into consideration section 55 of the Borders, Citizenship and Immigration Act of 2009. The majority of the court judges ruled that the appeal should be allowed due to the failure of the Tribunal to take into consideration the best interest of the child. Nevertheless, they did not uphold the appeal that the Secretary of State for the Home Department had an obligation to trace family members of the minor under article 19 of the reception directive. Likewise, the majority agreed that the obligation to trace family members exists separately from the duty to properly analyse an asylum claim, that must be able to be determined by its own merits. Lord Justice Pill, on the other hand, argued that in the application for asylum of the Afghani minor he should be treated as an orphan if no family relatives could be found and if, in the absence of adequate and safe reception facilities in his country, he could be subjected to exploitation and ill treatment under article 19. Furthermore, as an *obiter dicta* comment, he argued that they cannot ignore their duty of assessing the asylum application of an unaccompanied minor and that the failure of the minor to fully cooperate with the International Committee of the Red Cross tracing service was not enough justification for the lack of initiative in tracing family members from the Secretary of State for the Home Department.[182]

So, doctrine, jurisprudence and legal documents agree that unaccompanied asylum seeking minors fall under the category of vulnerable people are, therefore, entitled special rights, such as the guarantee that their "mental health shall be a primary concern"[183] and, again, that their detention should be only a measure of last resort and for the shortest amount of time possible and, preferably, not practiced in its totality. In fact, the law defends that detention should only be considered as an option when all other less coercive measures cannot be applied effectively[184] and the unaccompanied

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[182] United Kingdom - Court of Appeal (England and Wales), *DS (Afghanistan) v. Secretary of State for the Home Department*, [2011] EWCA Civ 305, 22 March 2011.

[183] Article 11 (1) of Directive 2013/33/EU.

[184] Article 11 (2) of Directive 2013/33/EU.

asylum seeking minor should only be detained in exceptional circumstances when all efforts to do otherwise have been exhausted. The Committee on the Rights of the Child defend that "the underlying approach to such a program should be care not detention".[185] The United Nations Rules for the Protection of Juveniles Deprived of their Liberty state that detention should be avoided before trial and limited to exceptional circumstances, which is not the case when it comes to unaccompanied refugee minors who are often deprived of liberty as an *a priori* measure that does not aim to punish or correct a crime but rather wishes to punish them simply for entering the country and seeking asylum, which is not in accordance with international legal human rights instruments. They should also be accommodated in appropriate conditions concerning privacy and separately from adults.[186] For female asylum seeking minors, they shall be detained separately from male applicants unless they are family and, even in this case, only with the consent of the female minor.[187]

**Process upon arrival**

In order to provide the best possible assistance and support to unaccompanied asylum seeking minors there must first be an identification process that identifies them as such and determines whether they are entitled to refugee status and, if not, to subsidiary protection.[188] Afterwards, there must be a determination of the age of the asylum seeker, which is determined with the help of documentation and, at times, medical examinations. However, these have proven to be controversial as they do not always accurately pinpoint age[189] and it is defended by experts that age assessment should take into consideration the psychological maturity of the individual, beyond

[185] United Nations Committee on the Rights of the Child, *supra* note 99, at 17.

[186] Article 11 (3) and (4) of Directive 2013/33/EU; United Nations Committee on the Rights of the Child, *supra* note 99.

[187] Article 11 (5) of Directive 2013/33/EU.

[188] United Nations Committee on the Rights of the Child, *supra* note 99.

[189] Noll, 'Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum', 28 *International Journal of Refugee Law* (2016) 234.

their physical age.[190] In the European Court for Human Rights case of Aarabi v Greece, the plaintiff was a minor who was a refugee from Palestine who grew up in Lebanon in a refugee camp and arrived to European soil by airplane. Upon arrival, the minor was arrested and detained for illegal entry into the country. However, as they had previously not been correctly identified as a minor, Aarabi was sent to an adult detention centre of Thessaloniki and later transferred to another detention centre at the Greek-Turkish border. While initially the Greek authorities had decided to expel him from the country, once he was properly identified as an unaccompanied minor he was released and placed in the accommodation facilities of an NGO.[191]

The Court found that the authorities had acted in good faith as they had immediately released him upon learning that the applicant was a minor. Nevertheless, the failure to properly conduct an initial interview resulted in the wrongful identification of the minor as an adult and was followed by placing him in two different detention facilities. Indeed, a more rigorous and detailed process for the initial interview, with a good sharing of data of United Nations and other international agencies, would help solidify the quality of this initial process in correctly identifying minors as such. Other criteria that should be taken into account when determining the refugee status of unaccompanied minors should be their developmental phase, limited knowledge of conditions for the grating of asylum and their special vulnerability, which may be expressed in different manners.[192] Moreover, the country of reception must consider not only the circumstances surrounding the child in their country of origin, but also the circumstances of family members which may endanger the child and also unaccompanied child-specific risks,[193] like increased vulnerability to matters like child recruitment into armed forces.

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[190] United Nations Commissioner for Refugees (UNHCR), *supra* note 9; United Nations Committee on the Rights of the Child, *supra* note 99.

[191] ECtHR *Aarabi v. Greece*, Appl. no. 39766/09, Judgement of 2. April 2015.

[192] United Nations Commissioner for Refugees (UNHCR), *supra* note 9.

[193] *Ibid.*

In a case before the Administrative Court of the Republic of Slovenia. an Afghani minor had left his country of origin alongside his brother, as their relative had been killed by the Taliban who later threatened to murder the entire family. However, during their escape, the minor became separated from his brother and was, now, an unaccompanied minor. Upon entry into Slovenia and having his right to asylum reviewed by the competent authority, the national Ministry of Interior, he had his asylum claim denied for lack of sufficient evidence that pointed to fear of persecution and failure to provide verifiable evidence. Indeed, they ruled out his request for asylum for his lack of knowledge of the name of the brother who had been murdered by the Taliban and any details his death, had failed to perceive any sadness within the family, failed to show any substantive elements of fear as the acts of persecution did not concern him personally and had failed to establish a connection between the persecution witnessed in Afghanistan and the grounds for such under the Geneva Convention on the Rights of Refugees.

Using the decision on the Elgafaji case of the Court of Justice of the European Union, the plaintiff argued that the more the applicant is capable of proving that he is personally affected by the threats and reasons related to his personal circumstances, the lower the level of arbitrary violence will need to be shown in order for subsidiary protection to be granted. As such, he would not have to had present higher levels of persecution occurring in the area as his relative and own family had been specifically targeted by the Taliban.

However, the Ministry of Interior argued that the asylum seeker had failed to prove any circumstances that would substantiate the recognition of protection and even being a minor did not constitute one of these personal circumstances.

The Administrative Court of the Republic of Slovenia concluded that the arguments used by the defendant were not enough to constitute basis for concluding that the asylum seeker did not show enough general credibility and ignored the claim of the plaintiff of having founded fear of the Taliban. In accordance with the ZMZ, the Slovenian International Protection Act, the Geneva Convention on the Rights of Refugees and the Qualification direction, there is no need for violence to be aimed directly at the person applying for international protection and, the Court further

added, threats and violence against family members can be considered as acts of persecution in themselves if the applicant is connected to the fact that lead to this violence. Additionally, according to the Convention on the Rights of Refugees, it is not the responsibility of the plaintiff to explicitly state the grounds for persecution as the legal assessment of the connection to this must be carried out by the defendant, the Minister of Interior. Moreover, It concluded the defendant had failed to protect the best interest of the child under the ZMZ and the Convention on the Rights of the Child by making no effort to trace the family of the minor and paying no attention to whether the child would be safely received at his country of origin, as under the principle in article 3 of the European Convention on Human Rights.
Finally, the court decided that the defendant, the Ministry of Interior, had failed to comply with articles 47 (6) and 16 (3) of the ZMZ, as they did not provide legal representation to the minor nor took into consideration his status as a minor during his application for international protection, and that the plaintiff belongs to a vulnerable group of children that are persecuted by the Taliban for military and political purposes as well as used by other criminal groups for slave trade, sexual violence, drug trade and other crimes.[194]

Following this example, it is clear that measures like prompt registration of the unaccompanied minor as such must be carried out as early as possible, through an interview that is done in an age and gender appropriate manner, in a language the minor can understand by qualified personnel. Building a system of trust between the minor and the authorities of the country of reception places the first in a position of less vulnerability through more communication between the two. Nevertheless, authorities of the country are not present necessarily to defend the interest of the child and, as such, I would also argue that there should be a legal counsel present in the initial interview which defends the interests of the child from the very beginning, as it can be at this stage that decisions that affect the quality of care and human rights provided to the child might be determined. Recording of further information such as

[194] Slovenia - Administrative Court of the Republic of Slovenia, 14 February 2012 I U 42/2012.

the reasons for being unaccompanied, assessment of particular vulnerabilities, such as health issues, suffering of domestic violence or human trafficking, for example, must all be recorded so as to collect the maximum amount of information to determine the potential existence of international protection needs.[195]

In a Dutch case in the District Court Harleem, an unaccompanied minor complained about the decision of the Minister of Interior to refuse his asylum claim as he considered it to be inconsistent with article 17 of Directive 2013/33/EU since his interview was conducted by an immigration and naturalization services official did not have adequate knowledge of the provisions applicable to minors and, thus, the decision to deny his asylum case had been carried out by an unqualified professional and the fact that he was a minor had not sufficiently been taken into account. The Court decided that procedural guarantees, namely those which apply to minors, should be known to those involved in the asylum procedures and, as this was not the case with this resolution, there had been a violation of the proceedings. Moreover, considering the national paragraph C13/3.2 of the Aliens Circular differentiates between minors younger and older than twelve years old, taking into consideration the different maturity and ages minors can present, the claim made by the Ministry that the official had been trained is not sufficient to claim that he had the necessary knowledge and, indeed, he had not evaluated the case correctly by not taking into consideration the age of the applicant.[196] We should not regard states as enemies of asylum seekers but rather as allies and, as such, states must ensure that those who handle the procedures receive adequate formation so they can handle cases in an appropriate and legal manner.

As early as possible, unaccompanied minors must be provided with identity documentation and efforts to trace their family members should begin. Following this, the Committee on the Rights of the Child advises that there should be the

[195] United Nations Committee on the Rights of the Child, *supra* note 99.

[196] Netherlands - District Court Haarlem, 18 November 2010, AWB 09/41370

appointment of a permanent guardian or adviser as well as a legal representative[197], which, as I have argued above, should follow the appointment of a, even if just temporary, legal adviser that would accompany the minor from the very beginning of the process - "states are required to create the underlying legal framework and take necessary measures to secure proper representation of an unaccompanied or separate child's best interest"[198]. The guardian shall be adequately informed and consulted on all matters related to the child, having the authority to legally represent them and the requirement of having the necessary experience in childcare to carry out this role. However, these guardians must not have conflicting interests, being that there must be monitoring and review mechanisms must be in place to ensure that the child is adequately represented in accordance to their best interests.

The European Court for Human Rights of Rahimi v Greece illustrates the several failures that can happen in the different steps of entry into the country and the following asylum procedures. The applicant was of Afghani origin and arrived in Greece at the age of fourteen/fifteen years of age, where he was placed in detention while waiting for a court order that would deport him. There was no legal or other type of support provided to the unaccompanied minor, who was released and was homeless for several days until he received assistance by a local non-governmental organisation. Two months later, after a clear failure on the part of the Greek state to provide the minor asylum seeker with support, he had his application for political asylum denied. Indeed, in front of the European Court of Human Rights, the plaintiff complained of the absence of support or appropriate accompaniment to his status as an unaccompanied minors, as well as about the conditions in the detention centre, where he was kept with adults.

The European Court of Human Rights decided in favour of the plaintiff, saying that article 3 and 13 of the European Convention on Human Rights had been violated since, even though the applicant was assigned to an adult, he had been left without a guardian for a lengthy period of time, being that there was no indication in his case

[197] United Nations Committee on the Rights of the Child, *supra* note 99.

[198] *Ibid.*, at 11.

file that the authorities had taken any actions besides assigning him a guardian, particularly since it had been clear that he was an unaccompanied minor with no legal representation and was detained alongside adults. In regards to the particular vulnerability of the unaccompanied minor, the Court considered that the Greek authorities had failed to give consideration to his individual circumstances, in breach of article 3 of the European Convention on Human Rights. Additionally, in violation of article 5 (4), the plaintiff was not able to contact a lawyer since the information brochure provided to him, which mentioned the possibility of filing a complaint to the chief police, was in Arabic and the plaintiff does not understand it and his mother tongue is Farsi, and he was not otherwise informed of the complaint procedure or if the chief police was required to respond to complaints and , in that case, within which period of time. Nevertheless, the Court questioned if placing the power in the chief of police was the best option in order to ensure the impartiality and objectivity necessary to provide an effective remedy to those who complain to him. The conditions in the detention centre were described as the European Court of Human Rights as being so poor that they undermine human dignity. In fact, the Court considered that the lack of support provided by the Greek government was such that it would have resolved in a level of anxiety and concern for the minor asylum seeker that it fulfilled the threshold for being considered degrading treatment which violated both article 3 and 13 of the European Convention on Human Rights. Moreover, the Court also decided that a violation of article 5 (1) (f) had taken place since the length of two days of this detention could not be justified with the reason given by the Greek authorities of deporting him and, more than that, the order for detention itself appeared to have been given with no consideration for the best interest of the applicant or if there was another alternative measure to detention that could be adopted.[199]

For those in detention, it is essential that not only are the minors properly identified and supported but, in order to do so, they must be provided with proper

[199] ECtHR - Rahimi v Greece Application No 8687/08

documentation, as well as with accurate and updated records which respect principles of confidentiality must be kept, with the admission, registration and any movements and transfers being documented. They must, again, be placed separately from adults and be put in open detention facilities with minimal security measures.[200]

In the Slovak case of M v Ministry of Interior, an Afghani unaccompanied minor argued that his different cultural and social background must be taken into account when assessing his application for asylum and attached credibility and that the Ministry of Interior had not taken into consideration the foreign cultural environment and his mental state and intellectual development. Having been granted subsidiary protection rather than asylum, the minor claimed there had been a breach of article 3(1) on the best interest of the child since the migration office said he had failed to provide sufficient justification for the refusal to grant asylum on humanitarian grounds and saying his testimony, that his father was murdered by the Taliban and he had fear of religious persecution, could not be trusted. Following these initial procedural measures, the unaccompanied minor shall be placed under the existing national care arrangements which may, and should, take into consideration the age, gender and culture of the child in their best interest.

The Court's decision failed to address if Afghanistan could be considered a safe country of origin, but claimed that the Ministry did not hold enough evidence to exclude the minor's fear of persecution due to his religion nor the story of his father's murder and, moreover, his statements were consistent. Indeed, the Court said the Ministry had failed to address the possibility of persecution by non-state entities.[201]

The different receiving states must be equipped to take into consideration the cultural and religious specificities of the cases that are presented to them and determine the fear of persecution asylum seekers are feeling in their specific conditions.

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[200] United Nations General Assembly, *supra* note 103.

[201] Slovakia - M. v Ministry of Interior of the Slovak Republic, 23 February 2010 iSza/12/2010

Finally, The UNHCR advises that the care and accommodation provided for unaccompanied minors should emphasis their best interests on a basis of care,[202] which is not the ethos behind detaining minors.

In the European Court of Human Rights case of Mohamed v Greece, the applicant was first arrested upon entering Greece where a FRONTEX agent erroneously registered him as being of age and sent him to a detention centre at Soufli border post. However, after the Greek Council for Refugees notified the prison director of the fact that the detainee was a minor, he was still kept in detention alongside adults and nothing was changed to accommodate for the fact that he was a minor and in a vulnerable position and, after being sent to the hospital where his age was medically confirmed, he was kept at the Soufli border post for an additional five months. Additionally, the detainee was provided with the reasoning and information regarding his detention in English, a language he could not understand and, as such, they failed their legal obligation to inform him in a language the detainee can comprehend.

The European Court of Human Rights decided that, as they failed to release him from detention even after knowing his age, there was an infringement of his right to liberty, a violation of article 3, lack of judicial oversight of article 13 and of article 5 (1) (f) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Indeed, it decided there was a violation of article 3 in conjugation with article 13 since the unaccompanied minor had only been released because it had been learnt that he had a brother living in Germany and failed to fulfill the requirements for effective remedy when the detainee had been subjected to inhuman treatment and his right to liberty and security.[203] As one goes further into the cases surrounding the situation of unaccompanied minors, it becomes clear just how essential procedural guarantees are for the insurance of the rights of detainees and asylum seekers.

**Right to Education**

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[202] United Nations Commissioner for Refugees (UNHCR), *supra* note 9.

[203] ECtHR *Mohamad v. Greece*, Appl. no. 70586/11, Judgement of 11. December 2015.

While the Committee on the Rights of the Child defends that states should ensure access to education is maintained during all phases of the asylum seeking process, be it in the form of vocational training or other types of education and ensure the maintenance and development of their native languages[204], and the UNHCR also defends that in under no conditions should the right of education of detained unaccompanied minors be suspended,[205] the fact is that the European directive states that the right to education of detained asylum seekers might be postponed up to three months.[206] Delaying access to education can have a major impact on a child's life, particularly for asylum seeking minors, who, in their escape from their countries, have already been deprived of a formal education. Indeed, providing education to unaccompanied minors as soon as possible once they are on European soil is not only a right granted by the Convention on the Rights of the Child and other legal instruments, but can also have a positive impact on the child's mental health, socialisation abilities and capacity for integration in society later in life, be it in their country of origin or their country of destination.[207] Whenever possible, the education provided should take place in a place outside of the detention facilities.[208] Indeed, inter-agency documents advise that education should never be carried out in a manner in which encourages or prolongs family separation, this is, certain forms of education should be avoided at centres providing interim care since this can prompt parents to place their children in these places.[209]

On the other hand, I would argue that if quality and provision of education was stable and equal through the different phases and locations of the asylum process, this danger would be eliminated and the right to education for every child would be more secured. Under conditions of detention, education, vocational training and work

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[204] United Nations Committee on the Rights of the Child, *supra* note 99.

[205] United Nations Commissioner for Refugees (UNHCR), *supra* note 9.

[206] Article 14 of Directive 2013/33/EU.

[207] Holman and Ziedenberg, 'The Dangers of Detention', *Washington, DC: Justice Policy Institute* (2006) 4.

[208] United Nations General Assembly, *supra* note 103.

[209] International Committee of the Red Cross, Central Tracing Agency and Protection Division, *supra* note 2.

should be promoted and, whenever possible, outside the detention facility and in a cultural and ethnically sensitive manner.[210] There must also be arrangements made to ensure that the unaccompanied detained minors have access to recreation and are free to practice their religion in an appropriate manner. However, the need for age-specific education and stimulation, as well as the right to play, are important for the development of the child's social abilities, which is clearly not best achieved, if at all, in detention.

**Right to health**

The right to the protection of health[211] and of access to the highest attainable standard of health[212] are rights that are not fully protected under detention conditions as these tend to be a breeding ground of diseases, due to the close quarters and conditions of living, and the general absence of outdoor activities and deprivation of liberty is known to have a serious impact on the mental health of detainees.[213] Moreover, the access to health must take into consideration the particular vulnerabilities of unaccompanied minors as these have suffered from "separation from family members and have also, to varying degrees, experienced loss, trauma, disruption and violence".[214] Psycho-social support is essential for recovery and integration into society, again, it is particularly important that those who have been victims of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or armed conflict are given special mental health support.[215] It is essential for recovery that there is an early meeting of basic needs, structured activities to restore a sense of normality are implemented, the existence of a system of care and nurturing alongside

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[210] United Nations General Assembly, *supra* note 103.

[211] Article 11 of the European Social Charter.

[212] United Nations Commissioner for Refugees (UNHCR), *supra* note 9; United Nations Committee on the Rights of the Child, *supra* note 99.

[213] ECtHR, Press Unit, Factsheet – Detention and Mental Health, July 2017.

[214] United Nations Committee on the Rights of the Child, *supra* note 99, at 14.

[215] *Ibid.*

a community based care and education.[216] Again, the conditions for the highest attainable standard of healthcare in terms of mental health are not located in a detention facility, nor is this facility accommodating for the promotion of mental health.

As we have seen above, the conditions that surround the detention of unaccompanied asylum seekers do not guarantee and, in fact, jeopardise the access and concretisation of basic human rights. Though the detention of this vulnerable group is often justified by authorities as being legal since it contributes to the maintenance of public order and security, the truth is that, as we have seen above, the manner in which this form of deprivation of liberty takes place does not uphold the best interest of the child and violates human rights principles in a manner which is not proportionate to the advantages claimed by the states. Indeed, as we will see next, there are alternatives to detention which allow states to exercise a similar amount of control as with detention while providing unaccompanied asylum seeking minors with much better care and protection of their human rights.

[216] United Nations Commissioner for Refugees (UNHCR), *supra* note 9.

## Not a Last Resort and Not for the Shortest Amount of Time - Denying the Legal Basis for the Detention of Asylum Seeking Minors and Presenting Alternatives

Those seeking international protection, be it in the form of asylum or subsidiary, are not criminals, the way many have portrayed them in the European political narrative of the past few years. Neither are economic migrants who come to Europe or to certain European countries seeking a better life in which they can reach a higher standard of living. The public discourse often fails to address the differences between economic migrants and asylum seekers, but they highlight the similarities of the attitudes of the nationals who receive them in their countries - they believe they are the same and act accordingly. This is important because we must remember that those who work at the borders of the country, deal with them in reception centers and decide on their appeals are part of the national population as a whole and might be influenced by these arguments. Indeed, this is why is is essential that those who work with asylum seekers are properly and regularly trained and informed of the plights, legal situation and rights of those who seek international protection. If the situations of those with refugee status and those without it might have come from situations which are not that different, the truth is that their legal status and rights are completely different. Those seeking asylum are entitled to special status when entering the country of destination, during the procedure and after the decision of granting them asylum has been decided. For unaccompanied asylum seeking minors, this statement is even more applicable since they are entitled to special protection due to their particular vulnerability. Asylum seeking unaccompanied minors travel to Europe without the support of a family system, often through perilous paths, suffering through trauma during traveling and after arrival and face a staggering lack of support and care once they arrive to European soil. The most shocking of these acts, which goes against every principle and right stated in the Convention on the Rights of the Child, the Convention on the Rights of Refugees and numerous European legal instruments, is the practice of detention of asylum seeking minors. Indeed, this is made worse by the fact that, as we have seen in previous chapters, this detention is practice as not even as pretrial measure, but worse, it occurs when no accusations have been made towards the minor whatsoever and their status has not been determined. These detention practices are, in theory, legally permitted if they are used as a last resort and for the shortest amount of time possible, particularly for reasons of national security or public safety[217]. However, I would argue that the situations and conditions in which these minors are detained do not fit these criteria.

[217] J. Hughes et al. (eds.), Detention of Asylum Seekers in Europe: Analysis and Perspectives (1998).

Individuals with special international protection, who are escaping their own home country, do not do so because they wish, but because they are required by external conditions and should not, under most circumstances, ever be detained. What is more important is that detention can not stand as the default manner of handling the arrival of unaccompanied asylum seeking minors. As we will see below, there are alternatives to detention which can uphold the rights of refugees and children while maintaining a certain level of vigilance over them which the states desires.

The first criteria we will analyse is the fact that detention of asylum seekers must be used only as a "last resort"[218]. The phrase "last resort" clearly implies that there is no other viable option other than the one being carried out, in this case, detention. However, we must ask ourselves regarding what exactly this measure is a last resort. In the case of detention, the narrative presented is that it is a last resort, the only option, for the preservation of public order and national security. However, in all European countries, there are reception centers aimed at receiving those who are requesting asylum once they come into the country. On another hand, detention at border centers, if only for a few days before transferring the asylum seeker, should not be called detention nor should it be done under conditions of detention. The increase in the influx of asylum seekers must mean that capacity for reception, such as accommodation and officials working on their cases, are increased to ensure that the quality of services and help provided does not decrease. Indeed, an increase in the influx of asylum seekers should never be accepted as a moral or legal excuse for a decrease in the human rights observed in countries of reception. This is particularly true in the case of unaccompanied asylum seeking minors who are, by law, entitled to special care and protection once they arrive at their country of reception.[219] Indeed, conditions under detention, especially when this is equivalent with being in the same quarters as adults and being submitted to violence, are not synonym with the special protection and care which they should be granted. Detention should not be considered as a valid last resort as it should not be even on the list of options for reception of unaccompanied minors seeking asylum. For this, it is important to understand that detention is not truly a last resort option and, as we will see below, there are alternatives when it comes to the reception of unaccompanied refugee minors which do not expose them to the same vulnerability and deliberate increase of likelihood of human rights violations. As such, when detention is used, though it might

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[218] United Nations High Commissioner for Refugees, *Detention Should Be a Measure of Last Resort*, 13 December 2012, UNHCR, available at http://www.unhcr.org/ceu/613-ennews2012detention-should-be-a-measure-of-last-resort-html.html (last visited 15 September 2017].

[219] Directive 2013/33/EU.

be claimed that it is a last resort, it is clear other options are in fact available which are simply not used either because they would be more expensive, require more personnel or, under the eyes of the government officials who make the decisions, be more dangerous. Although a great influx of asylum seekers should not be unsupervised and without state communication throughout the country before they are granted asylum, after an interview at the border and the prompt registration of their situation, asylum seekers should be given appropriate accommodation, education and short-term living condition assurances. Unaccompanied minors, in particular, should not be kept in detention while awaiting their asylum procedure to be finished or while they protest this decision with a court of law.

The other condition which must be fulfilled for the legality of the detention of asylum seekers, according to the parameters established by the European Union itself and the advice of international experts, is that detention, when it takes place, must be for the shortest amount of time possible. This condition must be fulfilled alongside the requirement for it being used only as a last resort. The shortest amount of time is not an easily definable term, its vagueness is deliberate, being more hard to pinpoint than the term "last resort". Nevertheless, there have been cases before national courts and the European Court for Human Rights that show that detention is often considered as not being used for the shortest amount of time.[220] To extent the period of detention of unaccompanied minors, when they are in a particularly vulnerable situation in which they do not have their family as adults who can observe their best interests, even if they have a guardian and legal counsel, cannot be in the best interest of the child. Detention is sometimes extended while unaccompanied minors await for for appeals of their asylum request or for their arrangements to be send back to their countries are carried out. Detention of unaccompanied asylum seeking minors is not excusable even if it is not for the shortest amount of time, but to extend it went it is not needed and not as a last resort is a clear violation of the legal provisions that underline the European Union asylum systems.

Finally, it is essential to understand that detention is not a last resort and not used for the shortest amount of time possible and alternatives to it do, indeed, exist. It is important that these alternatives observe the best interest of the child and, namely, make an effort to keep siblings together, placing asylum seekers in an environment which is preferably culturally and religiously accommodating. The families or organisations which receive asylum seekers must be monitored by independent

[220] ECtHR *Mohamad v. Greece*, Appl. no. 70586/11, Judgement of 11. December 2015.

groups to ensure that they are observing their responsibilities and respecting the human rights they are entitled. As far as alternatives to detention, the most viable ones, as they address the same situations, are the ones designed for short-term care and assistance arrangements, those which are meant to take place exactly while asylum status is decided or while a decision is appealed. These alternatives may, for example, include fostering by a family or institution, although expert agencies advise against this, claiming that, although a better alternative to detention, it should be "discouraged" as its character as a more traditional and spontaneous form of care also means it might not provide unaccompanied minors with the assistance and care they require.[221] Van Bueren goes further in his statements and claims that fostering as an alternative to institutional punishment requires careful state support and minoring as opportunities for abuse have been documented.[222] Likewise, institutional care is also seen as a last resort alternative to detention since it cannot always provide the developmental care and support a child needs, but might be a valid temporary arrangement to keep a minor out of a detention facility. Community-based care has the advantage of being able to keep the child in their own community and allow them a more familiar, not as institutionalised environment. All of these must be properly monitored and minors should only be placed under their care once basic care and accommodation conditions are assured. As guardians who are assigned to unaccompanied minors are meant to care for them within the asylum procedure and, as such, are required to possess training and education on the judicial matters of it, they are not necessarily in the best position to care for the same unaccompanied minors they are responsible for legally. Indeed, in the particular situation of unaccompanied minors and their more vulnerable position, it is essential that they are taken in by people with enough training that can identify, help them or direct them to specialised personnel who can assist them overcome any traumas or other psychosocial issues.

Detention is never in the best interest of the child and, as we have seen, the detention carried out in European countries does not abide by its legal standards as it is not, truly, executed as a last resort option nor for the shortest amount of time possible. Alternative care and assistance measures, which are more in alliance with the best interest of the child, such as community-based care, fostering or even institutional care, are better options which ensure, though not intrinsically, that more human rights will be observed and that the unaccompanied minor will have their vulnerable position

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[221] International Committee of the Red Cross, Central Tracing Agency and Protection Division, *supra* note 2.

[222] Van Bueren, *supra* note 75.

accommodated for in the country of reception. Reality, however, is direr than that, with alternatives to detention centres sometimes taking the form of the infamous Jungle in Calais and its deplorable conditions, it is important to remember that not placing asylum seekers in detention is not enough, their rights and proper conditions must be secured.

In denying detention as a means of dealing with an influx of asylum seekers, one should seek the application of alternative measures - "children seeking asylum should not be kept in detention. This is particularly important in the case of unaccompanied children".[223] One of the possible alternatives to detention are care arrangements, which must always take into consideration the best interest of the child.[224] These solutions, provided they are adapted for minors, emphasise the dimension of care while still allowing for the supervision partly aimed for with detention. This may come in the form of fostering or more long-term arrangements like community care or institutional care or even by child-headed households. Any long term solutions should only be sought after efforts to trace family members and reunification have been exhausted. Family reunification and resettlement in a third country for this effect must also be considered as primary alternatives to detention. As the case of a Kurdish Iraqi minor in the High Administrative Court of Saarland shows, even when there are viable alternatives to detention the authorities may choose to place the minor in detention. Indeed, although his brother was granted asylum status in Germany and set as his legal guardian, the unaccompanied minor was denied an asylum status assessment by Germany, which claimed they had no responsibility to analyse his case as they considered Belgium to be responsible for this[225]. As such, the unaccompanied minor was kept from his family and denied the right to family reunification. In a similar case, the Austrian Constitutional Court decided that, in the case of three siblings, with two of them being minors, who had previously been separated in Hungary and fled to Austria to be able to be kept together, that the country had the responsibility to protect the older brother's right to family, under

[223] United Nations Commissioner for Refugees (UNHCR), *supra* note 9, at 1.

[224] United Nations Commissioner for Refugees (UNHCR), *supra* note 9.

[225] Germany - High Administrative Court of Saarland - Case no. 2 A 313/13

article 8 of the European Convention on Human Rights[226]. Community based care can be advantageous in keeping the children in their own community, with a second option being fostering and, as a final option, institutional care. This last one is regarded as being the worst option, advised by experts to be seen only as a temporary measure, as it does not always provide the needed developmental care and support a child requires.

[226] Austria - Constitutional Court (VfGH), U1446-1448/2012

## CONCLUSION

The aim of this thesis is twofold - to analyse the principle of the best interest of the child while bettering the understanding of this complex concept and to explore how this principle cannot compatible with situations of detention of unaccompanied asylum seeking minor, who are not carried out according to European laws as they are not applied as a last resort nor for the shortest amount of time, and are not in accordance with international legal instruments due to their lack of respect for human rights principles there enshrined. This subject is particularly important at this movement as Europe continues to witness a great influx of asylum seekers and reports from human rights institutions and non-governmental organisations continue to be released giving account of numerous human rights violations being suffered by this vulnerable groups. Indeed, while this happens, accounts of thousands of asylum seeking children going missing after entering European soil, clearly highlighting how there is a lack of care and support given to these groups, are denounced and national and European courts condemn national authorities for their violations of the rights of asylum seekers. For unaccompanied minors the situation is even direr - they do not have adult family who can defend their interests, often they are not properly informed of the asylum procedures which concern them. As such, it is urgent that, in the mist of the rise of right-wing nationalist xenophobic public narrative, accurate information and education is provided to the populations, the officials dealing with procedures are adequately educated in matters of national law but also international human rights, and institutions and mechanisms are put in place to deal with the greater influx of asylum seekers while ensuring that vulnerable groups, like unaccompanied minors, are provided with additional support and faster processes. Detention, like we saw above, is not a viable solution for any of the issues presented and has not been, in fact, proven to contribute to national security or public order in any manner.[227] Detention is not in the best interest of the child, it does not respect the rights of the child and should not be continued, particularly when there are other viable alternatives.

We must consider the asylum seeking child in its different dimensions. This is, if the unaccompanied minor is a child who is entitled to specific rights as such, he is also an asylum seeker who has special rights and, lastly, he is an owner, in his own right, of reclaiming the respect

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[227] R. Sampson, *Reframing Immigration Detention in Response to Irregular Migration Does Detention Deter?* (2016), available at http://idcoalition.org/wp-content/uploads/2015/04/Briefing-Paper_Does-Detention-Deter_April-2015-A4_web.pdf (last visited 15 September 2017].

for his human rights. As the history of the legal development of the child as an owner of rights has shown, during the 20th century our attitudes towards children have changed dramatically, with children going from being seen as a property of their parents to being regarded as the owners of their own rights. This evolution of the manner in which children are thought about does not means that their existence is regarded as being apolitical or every child being seen as being entitled to the same rights. Undoubtedly, as a political subject,[228] the experiences of the unaccompanied minor in society, and the way he is viewed by it, are not separated from his religious identity or nationality. Moreover, I would argue that the historical evolution of the way in which children are conceived shows that their evolution, not yet concluded, in public opinion from being receivers of rights to being owners of their own rights still has a lengths to go. Indeed, often regarded as not being yet fully humans since they have considered adulthood, children must have their age and gender properly addressed in the asylum seeker but they should not be regarded as just the future owners of rights, but rather as the ones who are holders of their own rights and entitled to them from the moment they are born. Unaccompanied minors often suffer more difficulties during the asylum granting procedure exactly due to the fact that they are more vulnerable and their lack of maturity, natural of their age, does not allow them to process trauma or communicate the need for help, particularly in a foreign environment, in the same manner. This results, as we saw above, in a violation of rights, such as the right to effective remedy, the right to be informed of his situation or the right to have his opinion taken into consideration, which is perpetuated by an asylum granting and reception systems which often fail to address the special needs of unaccompanied minors, or even children, in these positions. In the case of detention, the special care that unaccompanied minors should be granted is overall forgotten and overlooked.

To shift the manner in which children were regarded in the eyes of the law, special advancements in the creation of international law instruments took place. First with the Declaration on the Rights of the Child and later with the Convention on the Rights of the Child, these documents began to recognise the child as an owner and subject of rights, with their own political, social, psychological, religious, health and educational vulnerabilities and specificities. One of the most important principle, and widely discussed in the literature, is the best interest of the child, which is often used to analyse other articles of the Convention, such as article 12, on the right of the child to be heard in every decision that concerns him. However, the principle is deliberately vague and, thus, both hard

[228] G. Agamben, *State of Exception* (2005).

to define and apply. If countries and organisations discuss what the exact meaning and application of the principle is, the fact is that the Committee on the Rights of the Child admits that there are certain practices which are never in the best interest of the child and could never be. Detention of unaccompanied minors or torture are acts which can never be in the best interest of the child. By providing the assurance that states should take into consideration the best interest of the child in all decisions concerning children,[229] the principle is broad in its application and in the protection in gives minors. Though and even through its lack of specificity, the best interest value ensures its power to be invoked in a variety of situations concerning minors and has been used to defend the rights of unaccompanied minors seeking asylum in Europe.

Although the Convention on the Rights of the Child is the most important international legal instrument protecting children, namely unaccompanied minors, it is not, in any way, the only one which does so. A number of regional instruments also focus specifically on provisions for the protection of children[230] and, for the case of unaccompanied asylum seeking minors in detention, there are international documents, such as the Convention on the Rights of Refugees or the Beijing rules, which serve to further the protection granted to these as minors, refugees, detainees and as all three simultaneously. Less specific instruments, such as the Universal Declaration on Human Rights or the International Covenant on Civil and Political Rights also contain provisions which, as they are applicable to all persons, also serve to protect the rights of unaccompanied minors. It is also essential to mention that, beyond states and their institutions, there are numerous international organisations, such as the United Nations High Commissioner for Refugees and the International Committee of the Red Cross and Red Crescent, as well as non-governmental organisations have a fundamental role as monitoring bodies and for providing support and care for those who need it, be it by providing food or legal counsel, amongst others.

In the case of European soil, not only do national and international legal instrument apply, but regional binding documents, such as directives and conventions, are also applicable by national courts and the European Court for Human Rights. At regional level, the European Union and other European regional organisations have created and adopted a series of instruments that aim to protect children, namely asylum seeking minors. Reality, however, does not comply with the legal

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[229] Article 3 of the Convention on the Rights of the Child.

[230] European Charter of Children's Rights (1993) and African Charter on the Rights and Welfare of the Child (1990).

obligations these countries carry. As we saw before, entry into the country, upon which unaccompanied asylum seeking minors are often detained, is not illegal and cannot be considered as such according to the Convention on the Rights of Refugees. Indeed, as state parties to the Convention, states have the duty to receive asylum seekers and provide them with care and protection, ensuring that their cases are properly assessed. If these conditions of prompt, yet throughout, consideration of each asylum case, with enough educated and professional officials handling the cases, insurance that informations are provided to unaccompanied minors in a clear and age-appropriate manner in a language they can understand, making sure they are appointed a guardian as soon as possible and receive legal counsel throughout the process, whilst taking the minor's own opinions into consideration. An improvement on the conditions and procedures upon arrival, such as initial interview and registration, in a way in which ensures that all relevant information has been shared between parties so that detention for the purpose of determining age is not practiced nor are children placed in detention with adults by mistake, which, as we have seen above, has happened before. By ensuring that procedural matters are handled correctly this would make it quicker, more efficient and more in line with the principles of human rights instruments.

Following this, the truth is that the detention of asylum seekers is often explained by states as being practiced in an effort to protect public order and national security, which constitute legal exceptions to the practice of the detention of asylum seekers who are not formally accused of any crimes. However, as I have argued, the practice of the detention of unaccompanied minors violates many human rights that should not, under any circumstances, be denied. The practice of knowingly keeping minors alongside adults in detention centres, not providing them with a guardian in the time advisable, not giving them information in the correct language and keeping them in quarters which are crowded, being that one case has even been considered to fulfill the conditions for being declared by the European Court of Human Rights as a practice which is equivalent degrading or otherwise inhuman treatment, serve to illustrate that detention of unaccompanied minors can never be humane. The impact of detention on unaccompanied minors in particular has not been shown yet, but the impact juvenile detention has on those with trauma and those who are in a vulnerable position has been proven to be extremely negative. Detention, then, can never be in the best interest of the child.

Finally, the thesis analysed if the legal basis upon which the detention of asylum seeking minors rests is indeed the practice which is carried out. As we have seen above, the practice of detention is

not used as a last resort, as there are other viable options available which still allow for asylum seekers to receive care and protection while not having their rights so exposed to violations. Likewise, the detention are not practiced for the shortest amount of time possible, with one of the unaccompanied asylum seeking minor being detained for over five months while awaiting deportation, and other similar cases that have been reported where asylum seekers are held in detention for months with no formal accusation against them and without their case being decided. Indeed, the detention of unaccompanied minors is a practice which is clearly not in the best interest of the child and, moreover, has viable alternatives. These should be thought of as short-term solutions which are applicable whilst the unaccompanied minor is awaiting his asylum request to be proceeded or while he awaits the result of his appeal of such decision. They can include institutional care, fostering or community-based care, which can better accommodate for the best interest of the child by promoting the care and protection of the unaccompanied minor with a better system of psychosocial support as well as, possibly, a cultural and religious community similar to their own. Detention is not the only, last resort solution for the influx of unaccompanied asylum seeking children coming into Europe, it is a choice which is actively made and perpetuated by the states in European soil.

In conclusion, this dissertation aims to be a reflection of how the best interest of the child, one of the most important principles enshrined in the Convention on the Rights of the Child, alongside other articles of the Convention and other legal instruments at national, regional and international level, are essential to uphold the rights of the child. As vulnerable, unaccompanied minors are entitled to a series of special provisions so that, positively, their rights can be observed. From this, the thesis moves on to an analysis of violations of the rights of unaccompanied asylum seeking minors which extend from entry into the country of destination to the asylum procedures and, in some cases, to the the practice of their detention. Considering this last case in more detail, this paper argues that this practice cannot be in the best interest of the children and is not, moreover, concurrent with the legal principles it must obey in order to be legally allowed - it is not done as a last resort nor is it practice for the shortest amount of time. Choosing alternative reception and care arrangements for arriving unaccompanied asylum seeking minors, we can achieve the goal drawn by the Committee on the Rights of the Child - “care, not detention”.[231]

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[231] International Committee of the Red Cross, Central Tracing Agency and Protection Division, *supra* note 2.

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